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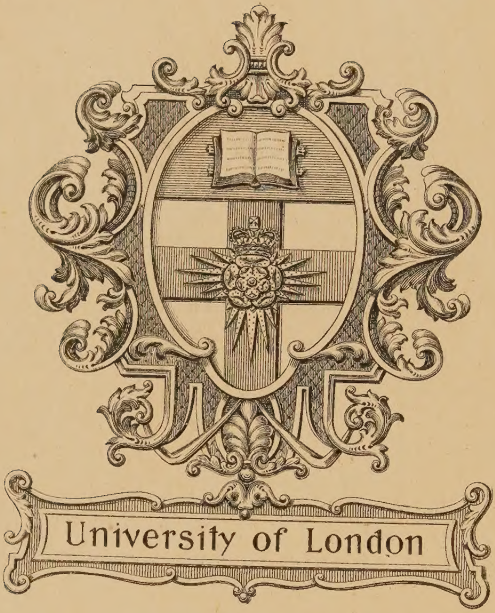

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EWING *v.* BUTTERCUP MARGARINE COMPANY, LIMITED.

[1917 E. 42.]

C. A.

1917

ASTBURY J.
March 2.

C. A.
April 24.

Trade Name—Similarity—Probability of Confusion—Injunction—Basis of Jurisdiction.

> The Court has jurisdiction to restrain a defendant from using a trade name colourably resembling that of the plaintiff, if the defendant's trade name, though innocently adopted, is calculated to deceive either (*a*) by diverting customers from the plaintiff to the defendant, or (*b*) by occasioning a confusion between the two businesses, e.g. by suggesting that the defendant's business is an extension, branch, or agency of or otherwise connected with the plaintiff's business.
>
> Decision of Astbury J. affirmed.

MOTION.

The plaintiff was a wholesale and retail provision merchant of Leith, Scotland.

In 1904 he commenced opening retail shops for the sale of butter, margarine, eggs, tea, cream, and condensed milk, and carried on this retail business under the trade name of the Buttercup Dairy Company. He had now 150 shops in Scotland and seven in the North of England, the nearest one to London being at West Hartlepool, and he intended to come further south after the war.

The business was well known to the buying public, the wholesale merchants, and the manufacturers and producers of the goods, and was popularly called the Buttercup Company or the Buttercup. The total turnover was half a million sterling a year, and the sale of margarine was fifty tons a week. Goods were always bought in the name of the Buttercup Dairy Company, by which name the business was known in the markets. Two thirds of the goods came from Denmark and Holland and the residue from the United Kingdom.

On November 15, 1916, the defendant company—the Buttercup Margarine Company, Limited—was incorporated as a private company. Its office was in Westminster, and, though the memorandum authorized both wholesale and retail trade in milk, cream, butter, margarine, &c., its main object and intention was to manufacture margarine by means of a secret process and to trade wholesale in the same.

The capital was 20,000*l.* divided into 10,000 ordinary shares of 1*l.* each, which were all issued as fully paid in consideration of the purchase of the secret process, and 10,000 preference shares of 1*l.* each, of which 250 had been issued and 1*s.* a share paid.

The three directors, two of whom were the signatories, had never heard of the plaintiff or his trade name, and adopted the name "Buttercup Margarine Company, Limited," quite innocently, after ascertaining that there was no similar name on the Company Register.

On November 23, 1916, the plaintiff complained of the name, and on January 31, 1917, after some preliminary correspondence, he issued a notice of motion to restrain the company and the directors from using or carrying on business under the name of the Buttercup Margarine Company, Limited, or any name colourably resembling the plaintiff's trade name, or otherwise carrying on business under any description calculated to produce the belief that the defendant company's business was that of the plaintiff or a branch or department thereof.

The hearing of the motion was treated as the trial of the action, and was heard before Astbury J. on March 2, 1917.

The plaintiff put in affidavits from well-known provision merchants in London, Somerset, and Yorkshire, showing that his business and trade name were well known and that the distinctive feature was the word "Buttercup." They said that the defendant company's name would cause confusion and lead the public and the trade to believe it was a branch of or connected with the plaintiff's business, and would cause him damage and inconvenience. They pointed out that a dairy company sometimes manufactured its margarine by means of an allied company—e.g., the Maypole Dairy Company manufactured its margarine by means of the Maypole Margarine Works, Limited, and it was known as Maypole margarine. In the same way, they said, the defendants' product would probably come to be retailed as Buttercup margarine.

The defendants proved that they had adopted the name innocently and stated that they were wholesale manufacturers and did not intend to engage in any kind of retail business, so that they would not compete with the plaintiff. They pointed out that the plaintiff's nearest shop was at West Hartlepool, 250 miles from their factory, which was in London. They proposed to sell their margarine wholesale under a distinctive trade mark or brand in no way resembling the company's name, but they had not yet commenced totrade or advertise, nor had they selected the trade mark. They would not be able to start trading till the latter end of March, or perhaps later. They also proved that the word "Buttercup" coupled with a design was used as a trade mark by provision merchants of Liverpool in connection with butter, cheese, and other provisions, a London manufacturers' agent in connection with preserved milk, and the Dairy Outfit Company, Limited, of London, in connection with "Buttercup" colour for milk, cheese or butter. None of these traders, however, had "Buttercup" as part of their trade name, nor, apart from "Buttercup" colour, was there any evidence that their goods were sold as "Buttercup."

Hon. Frank Russell, K.C., and *Ricardo*, for the plaintiff. The defendant company's name, though innocently adopted, will cause confusion and ought to be changed : *Hendriks* v. *Montagu.* (1) As they have not begun to trade or advertise, this will cause them no damage.

The plaintiff is clearly entitled to relief.

In the first place, the defendant company's name comprises the trade name of his goods—*Eastman Photographic Materials Co.* v. *Kodak Cycle Co.* (2); *Premier Cycle Co.* v. *Premier*

(1) (1881) 17 Ch. D. 638, 646. (2) (1898) 15 Rep. Pat. Cas. 105.

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Tube Co. (1)—and puts a possible instrument of fraud into the retailer's hand—*Lever* v. *Goodwin* (2)—leading to passing off.

Secondly, the name suggests that the defendant company's business is amalgamated with the plaintiff's business—*Manchester Brewery Co.* v. *North Cheshire and Manchester Brewery Co.* (3)—or is a branch or agency thereof: *Lloyd's* v. *Lloyd's* (*Southampton*), *Ld.* (4); *Walter* v. *Ashton.* (5) Even if this confusion of the two businesses does not result in passing off, it may involve the plaintiff in harassment or liability for the defendant company's acts, and if the defendant company were wound up the plaintiff might suffer in credit or reputation and a foreign consignment might be stopped.

Cunliffe, K.C., and *Owen Thompson*, for the defendants. The motion is misconceived. We intend to carry on a different business under a different name in a different locality and with absolutely different customers to those of the plaintiff. The jurisdiction in these cases rests either upon fraud or upon property; not that there is property in the name, but that the use of a name in which another carries on business will deceive "and will affect property by diverting customers to the person taking the name." Where this is not the case there is no jurisdiction: Buckley on Companies, 9th ed. p. 14.

The plaintiff must make out a probability of passing off by diversion of business: *Jamieson & Co.* v. *Jamieson* (6); *Turton* v. *Turton* (7); *George Outram & Co.* v. *London Evening Newspapers Co.* (8); *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank.* (9)

Now the plaintiff obviously cannot claim a monopoly in the common word "Buttercup": *Aerators, Ld.* v. *Tollitt* (10); and this is the only conceivable resemblance between his trade name "Buttercup Dairy Company" and our name "Buttercup Margarine Company, Limited." In any case our name is sufficiently distinguished within *J. & J. Cash, Ld.* v. *Cash* (11); and as our margarine will be sold under a distinctive brand not resembling our name, e.g., " Purple Brand," the goods cannot possibly be confused in any one's hands.

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(1) (1896) 12 Times L. R. 481.
(2) (1887) 36 Ch. D. 1.
(3) [1898] 1 Ch. 539; [1899] A. C. 83.
(4) (1912) 29 Rep. Pat. Cas. 433.
(5) [1902] 2 Ch. 282.
(6) (1898) 15 Rep. Pat. Cas. 169, 190.
(7) (1889) 42 Ch. D. 128, 136.
(8) (1911) 28 Rep. Pat. Cas. 308.
(9) (1878) 9 Ch. D. 560, 567.
(10) [1902] 2 Ch. 319, 323.
(11) (1902) 19 Rep. Pat. Cas. 181.

Again, we shall not commence trading till the latter end of March, by which time the plaintiff will have to put his own name on " all trade catalogues, trade circulars, show cards, and business letters " sent to any person in His Majesty's dominions : Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58), s. 18. This Act was passed on December 22, 1916, before this action was commenced, and s. 18 comes into force on March 22.

There cannot, therefore, be any possible confusion of the businesses in the United Kingdom or colonial markets. It is suggested that foreign vendors might be confused. But even if such confusion occurred it would be merely temporary, and in any case the principle is confined to confusion in the minds of the purchasers.

No doubt a voluntary change of name would not have damaged us, but, having regard to the correspondence, we determined to stand on our strict rights and leave the plaintiff to make out his case. As this is not a motion for an interlocutory but for a perpetual injunction, the balance of convenience—e.g., the fact that a change of name will not damage us—is absolutely immaterial.

Hon. Frank Russell, K.C., in reply. The note in Buckley on Companies, 9th ed. p. 14, is too narrow. The jurisdiction is not confined to fraud or diversion of business. It extends to cases of confusion between the two businesses : Kerly on Trade Marks, 4th ed. p. 548.

ASTBURY J. (after stating the facts). In these circumstances the plaintiff contends that the defendant company's business, if and when carried on, will be calculated, by reason of the company's name, to lead to confusion, and possibly to other mistakes, and that in the present circumstances it would really in no sense handicap or damage the defendant company if another name were adopted for the purposes of the business which they have not yet begun to carry on.

The present case is very near the line. The ground of interference by the Court in these name cases is that the use of the defendant company's name, or intended name, is calculated to deceive, and " so to divert business from the plaintiff to the defendant," or " to

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occasion a confusion between the two businesses": Kerly on Trade Marks, 4th ed. p. 548. The text-book rightly adds that "calculated to deceive" is not to be limited to the date of the proceedings, but the Court will have regard to the way in which the business may be carried on in the future, and to its not being carried on precisely as carried on at the date of the proceedings.

If the name, although not actually used by the plaintiff for the particular kind of goods to which the defendant has applied, or is proposing to apply it, is so identified with the name that the defendant uses that it may induce the belief that his goods are those of the plaintiff, or secondly that his business is an extension of, or otherwise connected with, the plaintiff's business, then the Court can grant relief.

In *Hendriks* v. *Montagu* (1) James L.J. said: "All the Court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two companies—so calculated to do it that when it is drawn to the attention of those adopting the name complained of that that would be the result, it is not honest for them to persevere in their intention, though originally the intention might not have been otherwise than honest"; and Cotton L.J. said that in the particular case before him the evidence was (2): "That what the defendants will do, if they are not restrained, will cause confusion and will induce people, or be the means of inducing people, who desire to insure in this long-established society of the plaintiff's, to insure in the defendants' office instead."

Now in the present case I have to decide, as a fact, whether on the evidence before me the use of the name "Buttercup Margarine Company, Limited," is calculated to deceive by diverting customers or potential customers, from the plaintiff; or to occasion such a confusion between the two businesses as has been referred to in the various authorities.

Prima facie the defendants will deal with a set of people altogether different from the plaintiff's customers. As wholesalers they will sell to shops, whereas the plaintiff's customers only purchase from shops. But a company that sells margarine under the title of the "Buttercup Margarine Company, Limited," need not be surprised if the natural result follows that its margarine comes to be so

(1) 17 Ch. D. 638, 646. (2) 17 Ch. D. 651.

identified with its name that retail shops carrying on business in the districts served by the plaintiff's shops may honestly offer the defendant company's margarine for sale, as the Buttercup Margarine Company's margarine or, shortly, "Buttercup Margarine." In these circumstances there is a reasonable possibility of the plaintiff's customers in those districts believing that the "Buttercup" margarine they have known in the past can now be obtained at other shops than "The Buttercup Dairy Company."

Further, I think that other confusion may arise. It is not an unknown thing for a dairy company selling butter substitutes to manufacture some of the products which it sells. For instance, the Maypole Dairy Company carry on business as manufacturers of margarine under the name of the Maypole Margarine Works, Limited, and just as that company's Maypole margarine can be purchased from the Maypole Dairy Company, so people may come to suppose that the plaintiff's "Buttercup" margarine can be bought from the Buttercup Margarine Company.

Thirdly, although this is perhaps further off, the plaintiff largely deals with foreign vendors of margarine. It is possible that the defendant company may deal with the same firms for the purpose of purchasing the constituents from which they will make their product. It is possible that confusion may arise in that respect, and that in certain events the plaintiff might suffer in credit, or otherwise from that confusion which would be caused entirely by the similarity of the two names.

For these reasons I think the plaintiff has made out a prima facie case that he will be, or may be, damaged within the meaning of the authorities if the defendant company is allowed to commence trading and to continue trading in its present name.

I am to some extent influenced by the fact that no substantial injury of any kind can be caused to the defendant company, now that it knows all these facts, by incurring the small expense necessary to change its name. There is no prima facie reason whatever why it should either have adopted, or, now that the facts are known, desire to continue, the use of the word "Buttercup" in its title. If it is continued, damage to the plaintiff may be reasonably anticipated. If it is changed, no damage or injury can thereby result to the defendants.

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On the whole, having regard to the evidence, the plaintiff has made out his right to the injunction he asks.

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The defendants appealed. The appeal was heard on April 24, 1917.

Cunliffe, K.C., and *Owen Thompson*, for the appellants. The appellants intend to carry on a different business in a different part of the United Kingdom and under a different name. There is no evidence that the respondent's goods are known as "Buttercup" goods. There is no suggestion of any fraud or that the appellants are attempting to get the respondent's business or that they will compete in any way with the respondent. The appellants have sufficiently distinguished between their business and that of the respondent. There is no reported case in which the Court has interfered by injunction unless there has been some deception or an appropriation by one person of another's business. Mere confusion is not sufficient to give a cause of action: *Levy* v. *Walker*. (1) There must be something in the nature of fraud. This is not a case of similarity of names as between two limited companies where a less amount of confusion will entitle a plaintiff to succeed. In *Ouvah Ceylon Estates, Ld.* v. *Uva Ceylon Rubber Estates, Ld.* (2) Cozens-Hardy M.R. said: "It must not be forgotten that the law gives a greater protection to companies in this matter than it does to individuals." The judgment of the Court below is based entirely on "confusion." Astbury J. has stated that "confusion" is something less than "deception."

[BANKES L.J. Does not confusion develop into deception when the trader becomes aware of it?]

The question here to be considered is what are the appellants threatening and intending to do? The Court has no power to interfere unless it is satisfied that the appellants are endeavouring to represent their business as that of the respondent. Astbury J. was misled by the statement referred to by him in his judgment from Kerly on Trade Marks, 4th ed. p. 548, that "The ground of the interference of the Court is, that the use of the defendant company's

(1) (1879) 10 Ch. D. 436, 448. (2) (1910) 27 Rep. Pat. Cas. 753, 756.

name, or its intended name, is calculated to deceive, and so to divert business from the plaintiff to the defendant, or to occasion a confusion between the two businesses." Relying on that passage and on *Hendriks* v. *Montagu* (1), he came to the conclusion that proof of confusion was sufficient to entitle the respondent to succeed. It is submitted that the learned author did not in the passage referred to mean that confusion alone was sufficient in an ordinary case but only in a case as between two limited companies. That this is so is shown by his quotation at p. 543 of a passage from the judgment of James L.J. in *Levy* v. *Walker* (2) as showing the principle on which a trade name is protected. The true view is that stated in Buckley on Companies, 9th ed. p. 14: "The jurisdiction in these cases rests either upon fraud or upon property; not that there is property in the name, but that the use of a name in which another carries on business will deceive and will affect property by diverting customers to the person taking the name. Where this is not the case there is no jurisdiction."

The respondent will now have to disclose his name under the Registration of Business Names Act, 1916 (6 & 7 Geo. 5, c. 58), s. 18. The respondent cannot suggest that he has a monopoly in the use of the word "Buttercup," for at least three other firms use that word as part of their trade name. The intention of the appellants is to manufacture margarine for retail traders who will put their own names upon it. They will not, therefore, compete with the same class of customers as the respondent. In order to succeed the respondent must prove that there will be such confusion as will enable the appellants to deprive him of the business which would otherwise go to him and so lead to loss on his part. This he has not done.

[LORD COZENS-HARDY M.R. referred to *Day* v. *Brownrigg*. (3)]

The mere fact that it would not put the appellants to much expense to change their name is not a sufficient reason for requiring them to do so. [They also referred to *North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.* (4)]

Hon. Frank Russell, K.C., and *Ricardo*, for the respondent, were not called upon.

(1) 17 Ch. D. 638.
(2) 10 Ch. D. 447.
(3) (1878) 10 Ch. D. 294.
(4) [1899] A. C. 83.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Astbury J. I agree with his judgment, and I think with every passage in it, with only one exception. He says that this is a case very near the line. In my opinion it is a perfectly plain and clear case, not very near the line, but well over the line.

The plaintiff has since 1904 been carrying on a business dealing with margarine, tea and such articles, and he has upwards of 150 shops of his own in which he sells his own goods. He sells upwards of fifty tons of margarine a week. The name under which he has carried on business is "Andrew Ewing, trading as the Buttercup Dairy Company." The business of the Buttercup Dairy Company is largely carried on in Scotland, and to some extent in the North of England, but not near London, or even the Midlands. It is a business which is extending southwards, and I do not in the least doubt that the Buttercup Dairy Company will, if so minded, extend the business into the South of England.

The defendants are the Buttercup Margarine Company, Limited, and there are two directors added as co-defendants, though this for the present purposes does not matter. The company is one which was registered in November, 1916, and as soon as the plaintiff heard of it he complained. The defendants have never carried on their business up to the present time; but the application to the Court was made promptly and in time, with the result that the learned judge granted an injunction restraining them from carrying on business under the name of the Buttercup Margarine Company, Limited. They were at the beginning of the year engaged in building a factory, but up to the present day they have not made or sold an ounce of margarine.

In a case like that, where the plaintiff is the owner of a business which has been established since 1904 and has a turnover of half a million a year, and must be regarded as an old-established business none the less because its actual sphere of operations is mainly in Scotland and the North of England, what should I expect the defendants as honest men or honest representatives of a newly formed company to do? I should expect them to say: "We are very sorry; we were not aware of your existence in Scotland, but as you object to our name we will change it so as not in any way to interfere with you." Instead of doing that they assert their right

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to use the name and file a mass of affidavits in support of their claim to do what they have threatened and continued to do; and they seek to justify their name on the ground that the arm of the Court is not long enough to reach a defendant who takes a name similar to that of the plaintiff, unless it can be shown that such name is calculated to deceive in the sense that a person desiring to be a customer of the plaintiff is induced thereby to become a customer of the defendant. And they say that there can be no deception here because they are wholesale people while the plaintiff is a retailer, that it is true that they have the fullest posssible power under the memorandum and articles of association to carry on a retail business, but that at the present moment they have no such intention. I should be very sorry indeed if the jurisdiction of the Court should be regarded as so limited. No doubt mere confusion due to some acts of the defendants would not be a cause of action—the case of *Day* v. *Brownrigg* (1) is a good illustration of that—but I know of no authority, and I can see no principle, which withholds us from preventing injury to the plaintiff in his business as a trader by a confusion which will lead people to conclude that the defendants are really connected in some way with the plaintiff or are carrying on a branch of the plaintiff's business.

The evidence given on behalf of the plaintiff—the greater bulk of which has been read—is summed up in the passage in which he says "that confusion which will be created in the manner hereinbefore suggested will undoubtedly operate to embarrass me in my business and cause serious injury damage and loss thereto." I cannot bring myself to doubt that what the defendants are threatening and intending to do would affect, and in all probability seriously affect, the plaintiff's business. We can only prophesy, because this action was commenced before the defendants' business was begun, but I cannot bring myself to doubt that serious damage to the credit and prosperity of the plaintiff's business would arise from the confusion caused by the defendant company deliberately and wilfully continuing to carry on business in a name so nearly resembling that under which the plaintiff is trading as to be calculated to deceive.

In my opinion this is, as I have already said, a case not on the line,

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(1) 10 Ch. D. 294.

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but well over the line; and I think the judgment of Astbury J. was perfectly right, and that the appeal must be dismissed with costs.

Bankes L.J. I agree. The plaintiff has been carrying on business for a long time under the style of the Buttercup Dairy Company, and the distinctive feature of that trade name is "Buttercup." The defendants have recently incorporated themselves as a private limited company under the name of the Buttercup Margarine Company, Limited, and they intend to manufacture margarine under that name and deal with it as wholesale manufacturers under that name. It is not a case in which the defendants have actually commenced manufacturing or trading, and therefore one is not dealing with the actual results of their trading, but with the probable or necessary results of trading under the name they have adopted. A very large body of evidence has been filed on behalf of the plaintiff consisting of affidavits by men connected with first-rate companies dealing in the provision trade in a very large way; and all those affidavits are, as it seems to me, framed on the assumption that the defendants will manufacture margarine and put it upon the market in some way identifying it as the margarine of their manufacture, and it is for that reason that they speak about a confusion in the minds of the public, and a confusion which will lead the public—by which is meant the public purchasing margarine—into the belief that the plaintiff's and the defendants' businesses are one, or that there is some connection between the two. If the Court accepts the view put forward by these witnesses—and it seems to me to be the natural view—a case is plainly made out for the injunction; and it is perfectly immaterial for the defendants to say that they are wholesale dealers. What does this matter if they intend to pass their goods on to the market as being of their manufacture with the intention that they shall retain their identity until they reach the retail purchasers? Or what does it matter that the business of the plaintiff at the present time is mainly confined to Scotland and parts of the North of England? All that seems to me to be perfectly immaterial. Then when the defendants come to put their case before the Court it becomes quite plain that they do intend that their manufactures shall retain their identity, because Sir Thomas Salter

Pyne, who makes the first affidavit for the defendants, says that they will sell their goods not in the retail market but in the wholesale market and under a distinctive trade mark or brand not yet determined upon, but in no way resembling the defendant company's name. In making that assertion with regard to the trade mark or brand he appears to me to be significantly silent about the name of his company, and it seems to me perfectly impossible to associate the defendant company's name with the manufactured article without producing the confusion of which the plaintiff's witnesses speak. It seems to me, therefore, that upon those materials the plaintiff has abundantly made out his case, and that the learned judge was quite justified in coming to the conclusion that it was quite reasonable to anticipate that unless the injunction went there would be the confusion of which the plaintiff's witnesses speak.

WARRINGTON L.J. I am of the same opinion. The plaintiff carries on a large retail general provision business under the title of the Buttercup Dairy Company. The defendants were incorporated in November, 1916, and they have a cash capital of 12*l.* 10*s.*—250 preference shares of 1*s.* each—and have adopted as their registered name the title of the Buttercup Margarine Company, Limited. Looking at those two names, it seems to me obvious that a trader or a customer who has been in the habit of dealing with the plaintiff might well think that the plaintiff had adopted the name of Buttercup Margarine Company, Limited, as his own name for the purposes of the margarine branch of his business, or for the purposes, if you will, of doing what it is said the defendants are going to do, namely, to make their own margarine instead of buying it in the market. If that be so, it seems to me that the plaintiff has proved enough. He has proved that the defendants have adopted such a name as may lead people who have dealings with the plaintiff to believe that the defendants' business is a branch of or associated with the plaintiff's business. To induce the belief that my business is a branch of another man's business may do that other man damage in various ways. The quality of goods I sell, the kind of business I do, the credit or otherwise which I enjoy are all things which may injure the other man who is assumed wrongly to be associated with me. And it is just that kind of injury that what the defendants

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have done here is likely to occasion. I think, therefore, the learned judge was perfectly right.

LORD COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitor for appellants: *D. E. Bowen Davies.*
Solicitors for respondent: *Neve, Beck & Kirby.*

W. I. C.

Townsend v. *Ascroft* - [1917] 2 Ch. 14
Distinguished. KIRKBY *v.* PHILLIPS
[1948] 1 Ch. 109

EVE J.
1917
April 25;
May 3.

TOWNSEND *v.* ASCROFT.

[1916 T. 1321.]

Will—Annuity—Charge on Realty—For Life or in Perpetuity—General Power of Appointment by Will—Perpetual Annuity.

A testator gave to his daughter an annuity of 30*l.* for her life, with a general power of leaving it by her will. The annuity was charged upon the testator's real estates. The daughter married, and by her will exercised the general power of appointment by giving "the said annuity of 30*l.*" to her daughter absolutely:—

Held, that the appointee was entitled to a perpetual annuity of 30*l.*

ACTION.

By his will dated October 24, 1856, Robert Backhouse, of Anthorn, in the county of Cumberland, bequeathed to his wife, Dorothy Backhouse, 1*l.* per week, and after bequeathing legacies to two of his daughters his will proceeded: "I give devise unto my daughter, Martha Backhouse, 30*l.* per annum during her natural life, and not to be subject to the debts, control, or engagement of the present or any future husband she may happen to have, only she has the power left of leaving it by her will, to be paid by my executor, or whom they appoint out of my real property. I give devise and bequeath unto my son John Backhouse of Anthorn all my real property both in Cumberland and Westmoreland, subject to all the legacies bequeathed by me to my wife and daughters"; and the testator appointed his wife, Dorothy Backhouse, sole executrix and residuary legatee.

The testator died in 1857, and his will was proved by his widow who died in 1866. Martha Backhouse married a Mr. Armstrong and died on April 5, 1915.

By her will, dated November 25, 1910, Martha Armstrong, after reciting the will of the testator giving her the annuity of 30*l.* and the power to her to leave it by will, proceeded : " Now in exercise of the said power I give and devise the said annuity of 30*l.* unto my daughter Mary Townsend, the wife of Henry George Townsend." Mary Townsend was the plaintiff in the action.

The defendants were the persons now entitled to the real estates in Cumberland and Westmoreland. No payment had been made by the defendants to the plaintiff in respect of the annuity since the death of Martha Armstrong.

The plaintiff, by her writ, claimed a declaration that by virtue, first, of the devise and power of appointment contained in the will of Robert Backhouse, and, secondly, the gift or appointment in the will of Martha Armstrong, she was now entitled to a perpetual rent-charge or annual sum (or, alternatively, a rent-charge or annuity during her life) of 30*l.* per annum charged upon the hereditaments devised by the will of the testator.

The question came before the Court upon an agreed statement of facts without pleadings.

Clayton, K.C., and *J. M. Gover*, for the plaintiff. This is a perpetual annuity of 30*l.* charged upon real estate. It is not an annuity in the usual sense, but a true legal rent-charge over some 300 acres of land. The power of leaving it by will must mean a power of leaving a perpetual rent-charge : *Warren* v. *Wright* (1) ; *Mansergh* v. *Campbell.* (2)

Maugham, K.C., and *Sheldon*, for the defendants. The annuity ceased on the death of Martha Armstrong, or at most, is only for the life of the plaintiff, the appointee. Our contention is that the gift over is too vague, and is void for uncertainty. But if not, upon the authorities it is an annuity for the life of the appointee only : *Blewitt* v. *Roberts* (3) ; *In re Morgan* (4) ; *Blight* v. *Hartnoll.* (5) Upon

(1) (1861) 12 Ir. Ch. Rep. 401.

(2) (1858) 3 De G. & J. 232.

(3) (1841) Cr. & Ph. 274.

(4) [1893] 3 Ch. 222.

(5) (1881) 19 Ch. D. 294.

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a fair construction of the will there is a special power to the daughter to continue the annuity to any husband who may survive her, or to appoint the annuity to one person only.

J. M. Gover in reply. Where there is a general power of appointment, as here, the annuity could be appointed to a number of persons in succession; it cannot be limited here to the life of the first taker. The subject-matter of the gift cannot be measured: Jarman on Wills, 6th ed., vol. ii., p. 1139, where the cases are collected.

Cur. adv. vult.

May 3. EVE J. The dispute in this action involves the construction of the following clause in the will of John Backhouse, dated October 24, 1856: [His Lordship read the clause in the will as set out above, and continued:] The plaintiff, to whom Martha Backhouse by her will dated November 25, 1910, after reciting the earlier part of the above clause, gave and devised "the said annuity of 30*l*." absolutely, claims that the same is a perpetual rent-charge; the defendants, who are substantially all the persons now possessed of the testator's real estate in Cumberland and Westmoreland, contend that the gift in remainder after the death of Martha Backhouse is void for uncertainty, or, alternatively, that the plaintiff is entitled to a rent-charge of 30*l*. per annum payable during her life only. It is true that if the word "it," which is used to indicate the subject of the gift in remainder, is limited in its meaning to the antecedent gift for life there is a gift of 30*l*. per annum to Martha Backhouse for her life, and a gift in remainder of the same life annuity to her testamentary appointee, and by this reasoning one arrives at a construction which is absurd rather than uncertain, and, indeed, so absurd as not to be adopted unless it is inevitable. That it is not inevitable, is, I think, shown by the case of *Blewitt* v. *Roberts* (1), where the wording of the will was not dissimilar in this respect. There the gifts for life and remainder were in these terms: "I give to my wife 600*l*. per annum for her life . . . . and after her death the said annuity to be divided equally between" six persons or the survivors or survivor. Strictly speaking, "the said annuity" there might be said to be the life annuity to the wife; but

(1) Cr. & Ph. 274.

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so to have construed it would have left nothing upon which the gift in remainder could operate, and the Court treated it as meaning the annual sum; and so here I think the word "it" must be construed as meaning the annual sum of 30*l.*, and not the life annuity given to Martha Backhouse. This construction removes, I think, any ground for declaring the gift void for uncertainty, and the question then arises as to the extent of the interest over which the power of appointment is exercisable. It is well settled that where an annuity is given to one person for life, and after his death to another person, the latter is only entitled for life, although no such restriction is in terms imposed upon the gift to him: *Blight* v. *Hartnoll.* (1) This rule has been extended to cases where the annuity in remainder is subject to a special power of appointment to an individual or class of individuals: see *Blewitt* v. *Roberts* (2) and the order made in that action by the Lord Chancellor on appeal. (3)

In the present case it was argued on behalf of the defendants that the rule ought also to be applied either, it was tentatively suggested, by construing the power to appoint as a special power to appoint to a surviving husband, or at any rate by construing it as a special power to appoint to one appointee only. The former of these arguments cannot, in my opinion, be supported, and the latter seems to be of the nature of a petitio principii in that it involves, first, the conclusion that the annuity is not a perpetual one, and then such a construction of the power to appoint as will make it fit and be applicable to the ascertained subject-matter. But, in my opinion, in a case where the real question is which of two alternatives is the subject-matter of the testamentary power the first step is to construe the power, and, when this has been done, to ascertain to which of the two possible alternatives it is the more responsive. I have here what I hold to be a general power of appointment, and, when one realizes the form which such a power assumes when written out in full, it is, I think, well nigh impossible to see how it could be held to be properly applicable to an annuity to be limited to the life of the first and only taker. The fact that the donee of such a power could appoint to several successively, or in common, appears in itself to be an almost conclusive answer to such a suggestion, and

(1) 19 Ch. D. 294. (2) Cr. & Ph. 274.
(3) 10 Sim. 493.

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I think that if I were to hold the subject-matter of this gift to be of the restricted nature contended for by the defendants I should be ignoring the true construction of the testamentary power given to the annuitant.

Accordingly I decide that the annuity is a perpetual one, and there will be a declaration to that effect. The plaintiff will have the costs of the action.

Solicitors: *Maude & Tunnicliffe, for Green & Williamson, Wakefield; Rawle, Johnstone & Co., for W. R. & W. Ascroft, Preston.*

G. M.

ASTBURY J.
1917
March 29, 30;
April 4.

In re CUSTOMS AND EXCISE OFFICERS' MUTUAL GUARANTEE FUND.

ROBSON *v.* ATTORNEY-GENERAL.

[1916 C. 2566.]

Co-ownership—Individuals or Class—Association to secure particular Benefits to Members—Association intended to be permanent—Purpose obsolete—Surplus Funds—Resulting Trust—Bona vacantia.

Where a fluctuating body of persons contribute to a fund vested in trustees, and intended to be permanent, for the purpose of performing a particular service for the contributors for the time being, and the need for that service comes to an end, the surplus of the contributed fund, after all the services provided by the trust have been performed, belongs to the class of contributors ascertained at the date when the purpose of the fund comes to an end in proportion to their contributions, and neither past contributors nor the Crown have any interest.

ORIGINATING SUMMONS.

On February 16, 1852, the Board of Inland Revenue, in view of the difficulty experienced by Excise officers in obtaining sureties for their bonds, made a general order establishing a mutual guarantee fund of 10,000*l.* called the "Inland Revenue Excise Guarantee Fund" (and hereinafter called the "Excise Fund") under certain regulations.

Regulation 1 provided that personal bonds should be given by the collectors and other officers authorized to receive revenue money, and in case of default should be put in suit against the defaulter.

Regulations 2 and 3 fixed the contributions to the fund, which were to be paid by two instalments. The amount was in effect 1 per cent. on the bond.

Regulation 4 provided that the fund should be invested in Government securities in the name of the chairman of the Board.

Regulation 5 provided that in the event of the fund being reduced below 10,000*l.* the officers were to contribute rateably to the deficiency.

Regulation 6 provided that the interest should be appropriated to the purchase of additional stock; and on the death or retirement of any contributor the sum then at his credit, including interest, should be paid to him or his legal representative; and that in order to avoid the sale of stock for that purpose 500*l.* should be kept on a deposit account in the secretary's name. In practice the deposits were repaid with 2½ per cent. interest.

Regulation 7 provided that the existing bonds should remain in force until the last instalment was paid, when they would be given up to the officers.

There was no provision for altering these regulations, or for winding up the fund.

On March 3, 1857, the establishment of a "Customs Officers' Guarantee Fund" (hereinafter called the "Customs Fund") and rules relating thereto were sanctioned by the Customs Commissioners. The preamble to the rules stated that the directors of the "Customs Annuity and Benevolent Fund Incorporated" (hereinafter called the "Incorporated Fund") had voluntarily undertaken the formation and management of the Customs Fund on behalf of the subscribers, and it had been determined that all Customs officers required to give security for fidelity should be at liberty to establish a guarantee fund for the purpose of providing such security by means of contributions among themselves in lieu of finding sureties; and that the management and appropriation of the fund should be subject to the following rules.

Rule 2 provided that every officer desirous of availing himself of the Customs Fund in lieu of finding sureties should sign a printed form in that behalf expressing his submission to the rules for the time being in force.

Rules 3 and 6 provided that each subscriber should contribute a sum not exceeding 1 per cent. on his security or increased security.

Rule 8 provided that every subscriber should enter into a fidelity bond.

Rule 9 provided that in case of default the bond should in the first instance be put in suit against the subscriber, and the balance not recovered from him should be made good out of the Customs Fund.

Rule 10 provided that whenever the fund fell below 3500*l.* rateable calls might be made upon the subscribers for the deficiency.

Rule 11 provided that upon a subscriber's retirement, dismissal, or death, in case the fund had not sustained any loss by his default, the full amount of his contributions, subject to rateable deductions for losses and expenses, but without any interest, should, unless otherwise agreed, be repaid to him or his personal representatives within twelve calendar months. In case of loss through the subscriber's default, not causing his dismissal, the balance was repayable at the managers' discretion.

Rule 12 enabled the managers to determine and guarantee and return contributions subject to similar deductions.

Rule 13 enabled a subscriber to retire from the fund.

Rule 15 provided that " Whenever the monies in the hands or to the credit of the trustees of the fund shall exceed such amount as the managers of the fund shall deem requisite for the purposes of the Guarantee Fund,"—i.e. the Customs Fund—" or of defraying the necessary expenses of management, the surplus shall, from time to time, be paid over to, and in aid of, a benevolent fund for the benefit of the subscribers to the Guarantee Fund, or of the widows, children, or relatives of deceased subscribers; and such benevolent fund shall be so distributed and applied by the managers of the fund as they in their discretion shall think fit."

Rule 16 empowered the managers to alter the rules with the assent of two thirds in value of the subscribers.

A form of request for admission as a subscriber was appended.

There was no provision for winding up the fund.

By the Excise Transfer Order, 1909 (Statutory Rules and Orders, 1909, No. 197), made under the authority of the Finance Act, 1908 (8 Edw. 7, c. 16), s. 4, the management of excise duties and all the powers and duties of the Inland Revenue Commissioners in connection therewith were as from April 1, 1909, transferred to the Customs Commissioners, who were thereafter to be called the Customs and Excise Commissioners.

In consequence of the amalgamation of these two departments it became expedient to amalgamate the two funds. This was effected by altering the Customs Fund Rules of 1857, and a copy of the proposed new rules was sent to all Customs officers on May 17, 1910, with a circular letter enclosing a form of assent or dissent to be returned by May 27.

Rule 1 provided that the Customs Fund should be open to all Customs and Excise officers.

Rule 2 provided that the fund (hereinafter called the "Amalgamated Fund") should be called the "Customs and Excise Officers' Mutual Guarantee Fund," and should take over the existing funds of the Customs Fund and should be under the management of the directors of the Incorporated Fund.

Rule 3 (formerly rule 2) provided for applications being made on a printed form expressing submission to the rules, and rules 4 and 7 (formerly rules 3 and 6) provided for a contribution of 1 per cent. on the security or increased security.

Rule 9 (formerly rule 8) provided that every subscriber should enter into a fidelity bond, and declared that the Amalgamated Fund undertook all the liability of the Customs Fund in respect of bonds given through the latter fund. It also provided that upon the transfer of the existing funds of the Excise Fund to the managers of the Amalgamated Fund the managers would undertake liability in respect of fresh bonds to be issued in lieu of bonds entered into with the Excise Fund, and in respect of interest due to subscribers in that fund under its rules, and in respect of any other liability arising out of bonds theretofore given through the Excise Fund.

Rule 10 (formerly rule 9) provided, as before, for the bond being first put in suit against the subscriber in case of default, any deficiency to be made good by the Amalgamated Fund.

Rule 11 (formerly rule 10) provided that in the event of the fund being reduced below the amounts of the subscribers' deposits with accumulated interest due to them the managers might make a rateable call for the deficiency.

Rule 12 (formerly rule 11) provided, as before, for the return of a subscriber's deposits on retirement, dismissal, or death, but gave him 2½ per cent. simple interest on the amount.

Rules 13 and 14 (formerly rules 12 and 13) respectively enabled the managers to determine a guarantee and subscribers to retire.

Rule 16 (formerly rule 15) provided that "Whenever the moneys in the hands [*sic*] or to the credit of the fund shall exceed such amount as the managers of the fund shall deem requisite for the purposes of the Guarantee Fund,"—i.e. the Amalgamated Fund—"including the provision of accrued interest and of defraying the necessary expenses of management the surplus shall, from time to time, be paid over to, and in aid of, a benevolent fund for the benefit of the subscribers to the aforesaid Guarantee Funds, [*sic*] or of the widows, children, or relatives of deceased subscribers; and such benevolent fund shall be so distributed and applied by the managers of the fund as they in their discretion shall think fit."

Rule 17 (formerly rule 16) empowered the managers to alter the rules with the assent of two thirds in value of the subscribers.

A form of request for admission as a subscriber was appended. There was no provision for winding up the fund.

The requisite assent of the Customs subscribers having been obtained, the altered rules were adopted by the managers on June 2, 1910, and confirmed by the Customs and Excise Commissioners on June 3.

The next step was to deal with the Excise officers, and accordingly on June 6, 1910, the Customs and Excise Commissioners made a general order in that behalf. This order stated that the amalgamation of the two funds had been approved and would take place from July 1, 1910, when the funds would be merged in the Amalgamated Fund. The winding up of the Excise Fund would necessitate the giving of a fresh bond by every Excise officer before July 1. Officers giving fresh bonds through the medium of the Amalgamated Fund would incur no expense. The contribution would be unaltered, and the contribution already paid would be placed to the subscriber's credit with interest accrued up to June 30, and would bear interest from July 1. The new rules, with forms of proposal, would shortly be forwarded to each collector for distribution. No obligation was imposed upon Excise officers giving bonds then or thereafter to join the Amalgamated Fund. They might submit alternative proposals by June 15, by which date the collectors were to return the names of all officers with bonds under the old Excise Fund and state whether or not the fresh bond would be given through the Amalgamated Fund.

Shortly after this the Excise Fund was transferred to the Amalgamated Fund with the view of merging the two old funds.

At the date of the amalgamation the Excise Fund was about 19,000*l.*, and the surplus fund, after allowing for repayment of contributions, was 2800*l.* At the same date the Customs Fund was about 9700*l.* and the surplus fund 3000*l.*

The requirement of fidelity bonds ceased on December 31, 1914, and since that date there had been no further subscriptions to the fund, and all bonds had been cancelled.

The fund, in round figures, was now 2300*l.*, of which 1040*l.* (made up of 920*l.* capital and 120*l.* interest) was due to 360 untraceable Customs contributors, and 1260*l.* was pure surplus arising from accumulations of interest over and above the $2\frac{1}{2}$ per cent. repaid to depositors.

The usual Excise contribution was 10*l.* or upwards, and all Excise contributors had in fact been paid off with $2\frac{1}{2}$ per cent. interest. The usual Customs contribution was much smaller, namely, about one or two pounds, so that in a very large number of cases repayment had not been demanded. With the exception of sixteen deposits totalling 17*l.*, the unclaimed Customs deposits arose on bonds falling in before the end of 1910.

On November 16, 1916, the managers issued this summons to determine what was to be done with the fund.

Stamp, for the managers. There are several contentions. The Attorney-General claims the whole surplus either as charitable or as bona vacantia. The living Excise subscribers who joined the Excise Fund and the Amalgamated Fund contend that they and the Customs subscribers who joined the Customs Fund and the Amalgamated Fund took by way of resulting trust at the dissolution on December 31, 1914. The living Customs subscribers on the other hand contend that the surplus went to the benevolent fund under rule 16. The representatives of Excise Fund subscribers who died prior to the amalgamation, and whose deposits were repaid with 2½ per cent. interest, contend that they are not bound by the amalgamation and claim the surplus of the old Excise Fund. In the special circumstances it was thought unnecessary to join the representatives of deceased Customs subscribers, their individual claims being very small and mostly statute-barred.

Austen-Cartmell, for the Attorney-General. The subscribers who joined the Amalgamated Fund are only entitled to the benefits they bargained for under the 1910 rules, and there is no case of any resulting trust. While the Amalgamated Fund was a going concern the surplus, if any, was carried to the benevolent fund under rule 16, and was in fact applied to eleemosynary purposes. This can be proved if necessary. The subscribers could not, therefore, have joined together and disposed of the Amalgamated Fund. That is the real test of their rights: *In re Clarke.* (1) The benevolent fund trusts came to an end at the same time as the Amalgamated Fund, but there was a general charitable intention under rule 16 as to the disposal of any surplus, and the present surplus should be applied cy près: *In re Buck.* (2) If not charitable, the surplus is undisposed of and belongs to the Crown as bona vacantia: *Cunnack* v. *Edwards* (3); *Braithwaite* v. *Attorney-General.* (4) The representatives of the deceased Excise Fund subscribers were paid out under the 1852 regulations, and presumably accepted their principal with 2½ per cent. interest in full satisfaction of their rights. In any case their rights are now statute-barred.

Howard Wright, for Customs Fund subscribers who had joined the Amalgamated Fund. The whole surplus goes to the benevolent fund under rule 16. Whether that fund is charitable or not is immaterial. There can be no question of perpetuity, as the managers can apply both capital and income at their discretion. The representatives of deceased Excise Fund subscribers who died before the amalgamation are not only statute-barred, but in any case their old fund, if kept distinct, would have depreciated more than enough to wipe out their surplus. A claim to bona vacantia

(1) [1901] 2 Ch. 110, 121.
(2) [1896] 2 Ch. 727.
(3) [1896] 2 Ch. 679.
(4) [1909] 1 Ch. 510.

postulates absence of title: *Dyke* v. *Walford* (1); *In re Higginson and Dean.* (2)

Hon. Frank Russell, K.C., and *J. Samuel Green*, for Excise Fund subscribers who joined the Amalgamated Fund. The Amalgamated Fund was obviously intended to be permanent, and the surplus belonged to the existing members at its dissolution on December 31, 1914. They voluntarily clubbed together and paid their money to the managers for special purposes, including repayment of a member's deposits on retirement, dismissal, or death. Any surplus clearly belonged to them, and not to retired or deceased members, whose deposits had been returned under the rules. In *Cunnack* v. *Edwards* (3) the possibility of a resulting trust was precluded by the Friendly Societies Act, 1829 (10 Geo. 4, c. 56), ss. 3, 26. There is nothing of that sort here. The claim to bona vacantia is misconceived. Suppose people subscribe to a dinner, and owing to the Food Controller's regulations the dinner, though equally excellent, costs less than they subscribed. Is the surplus bona vacantia? The present case is very analogous to *In re Printers and Transferrers Amalgamated Trades Protection Society* (4), in which the Attorney-General did not venture to assert such a claim. The order is printed in Seton on Judgments, 7th ed., p. 2103. The surplus should be distributed in proportion to the amounts contributed: *In re Lead Company's Workmen's Fund Society.* (5) The surplus cannot go to the benevolent fund, as rule 16 clearly only applied while the Amalgamated Fund was a going concern. The trusts of that fund were not charitable, so there is no case for cy près: *Morice* v. *Bishop of Durham* (6); *Attorney-General for New Zealand* v. *Brown.* (7)

W. E. Vernon, for the representatives of Excise Fund subscribers who died before the amalgamation. There was no power to alter the Excise Fund regulations, and the amalgamation does not bind my clients. They are entitled by way of resulting trust to the surplus attributable to the old Excise Fund, and there must be proper class inquiries. These will no doubt exhaust the fund, but there is no other way out, if there is a resulting trust: *Cunnack* v. *Edwards.* (1) The fund is still in the hands of the managers as trustees, so that no question of any Statute of Limitation can arise. In the *Printers' Case* (2) the point as to the rights of deceased members was not argued, and Byrne J. merely held that the funds were for the benefit of the members for the time being. That is not so here.

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(1) (1846) 5 Moo. P. C. 434.
(2) [1899] 1 Q. B. 325.
(3) [1896] 2 Ch. 679, 687, 688.
(4) [1899] 2 Ch. 184.
(5) [1904] 2 Ch. 196.
(6) (1804) 9 Ves. 399; (1805) 10 Ves. 522.
(7) [1917] W. N. 127; [1917] A. C. 393.

Cur. adv. vult.

April 4. ASTBURY J. (after stating how the questions arose). The Attorney-General contends that the whole of the moneys now in the hands of the applicants, or so much thereof as remains after discharging the remaining enforceable liabilities, if any, of the Guarantee Fund, is subject to a charitable trust under rule 16 of the 1910 rules and ought now to be applied cy près. Alternatively that the same belongs to the Crown as bona vacantia.

The representatives of Excise subscribers who died prior to the amalgamation in 1910 contend that, after repayment of the deposits and interest to those Customs subscribers or their representatives who have not yet been found and paid, the balance of the fund is subject to a resulting trust in favour of all subscribers to the two original funds or to the Amalgamated Fund or their representatives in proportion to the amounts contributed by them respectively. They ask for the necessary inquiries to effect a distribution on this basis. If I were obliged to hold that the funds now remaining to be dealt with were distributable on this basis I should hesitate long before directing these inquiries. The process would be well-nigh interminable and the difficulties involved probably insuperable before any result could be obtained, and the funds would be exhausted long before the end was in sight. The result would be that no one entitled to the moneys or any part thereof could ever hope to be paid anything, and the partially completed inquiries would be futile. In *Cunnack* v. *Edwards* (1) Chitty J. in a somewhat similar set of circumstances thought there were no other means of cutting the Gordian knot. But the Court has a discretion in ordering administration, and, if satisfied that the only possible result would

(1) [1895] 1 Ch. 489.

(2) [1899] 2 Ch. 184, 189.

be to destroy the fund to be administered, I am, as at present advised, inclined to think that the preferable course in such a case would be to order the fund to be paid into or to remain in Court and leave the claimants thereon who could obtain no possible benefit from such inquiries to devise some other more practicable procedure for enforcing their rights, and pending this to retain the same negative advantage that would result to them from destroying the fund by inquiries of the above character by refraining from doing so.

The living subscribers to the Customs Fund who joined the Amalgamated Fund contend that, subject to payment of enforceable obligations of the Guarantee Fund, the surplus of the funds in question forms part of the benevolent fund under rule 16, which though not charitable in the legal sense, is according to their contention still operative in accordance with the trusts declared in respect of it by the rule.

The living subscribers to the Excise Fund who joined the Amalgamated Fund submit that, subject as above, the surplus of the fund belongs to the subscribers living on December 31, 1914, and to the representatives of such of them as have since died, and that the doctrine of resulting trust is not otherwise applicable.

The answer to the riddle depends upon the true construction and effect of the new rules of 1910, subject to the rights, if any, of the estates of deceased Excise subscribers who died before that year, the earlier rules regulating the Customs Fund being in respect of Customs subscribers substantially the same as the new rules regulating the rights of subscribers to the Amalgamated Fund. Under these new rules all subscribers in return for their deposits, the amounts of which were determined by rules 4, 7, and 11, enjoyed during their lives or period of service the benefit of the guarantee provided by the fund so created, with the right on retirement, dismissal, or death to be repaid the whole of their deposits with interest at 2½ per cent., less the claims, if any, on the part of the managers of the fund, and whenever the money in the hands or to the credit of the fund exceeded such amount as the managers deemed requisite for the purposes of the Guarantee Fund the surplus was under rule 16 applicable as part of the benevolent fund therein provided for. In other words, the subscribers to the common venture agreed

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inter se that the Guarantee Fund should be and remain for the benefit of the subscribers living and in service from time to time, less the full amount of the deposit and 2½ per cent. interest repayable to those dying or leaving the service and the amounts transferred from time to time to the benevolent fund. The winding up of the Guarantee Fund was not contemplated or provided for.

Subject to the question raised as to the benevolent fund, it seems to me that on December 31, 1914, the persons interested in the funds then in the hands of the managers less the amounts of deposit and interest then payable to deceased or retired subscribers were the then members of or subscribers to the venture and no one else. All deceased and retired members had agreed in consideration of the contingent benefit of guarantee enjoyed by them during service and of the return of their deposits and interest at its termination that the fund should continue in the interest of the continuing subscribers and of them alone. This, I think, is the result of the contract contained in the rules—subscribers, by agreeing that on death or retirement they should be repaid from the continuing fund their deposits and interest at a definite rate, must be taken to have abandoned in favour of the fund and the continuing members of the venture all further claims. It is impossible here to hold, as in *Braithwaite* v. *Attorney-General* (1), that the subscribers from time to time had no interest in the Guarantee Fund beyond a right purchased by their subscriptions, or, as in *Cunnack* v. *Edwards* (2), as decided by the Court of Appeal, that each subscriber on making his deposit had finally and for ever parted with the whole of his interest in the money so paid in favour of third parties. The case falls much more nearly within the scope of the *Printers' Case* (3), which appears to me in substance to apply. If shortly after the establishment of the fund all the subscribers had agreed to terminate the venture, or it had otherwise ceased, the surplus moneys arising from compound interest and management over and above the amounts of the deposits and interest thereon at 2½ per cent. could hardly be described as bona vacantia, and the intervening decease of some of the subscribers would not, as it seems to me, make that description more applicable than before.

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(1) [1909] 1 Ch. 510. (2) [1896] 2 Ch. 679.
(3) [1899] 2 Ch. 184.

As to the benevolent fund, I am of opinion that on the true construction of rule 16 the provision therein made for handing over surplus moneys from time to time for distribution thereunder only applied so long as the Guarantee Fund was kept alive as an operative source of guarantee. It is impossible, I think, to hold that the whole of the moneys in the managers' hands at the termination of the venture after returning deposits and interest to all the subscribers was a surplus over and above such amount as they should then deem requisite for the purposes of the Guarantee Fund within the true meaning of the rule. The rule cannot, I think, be so construed as to enable the managers on the dissolution of the venture to deprive the persons entitled at that date of the surplus assets which then became distributable in accordance with the rights then existent.

This disposes of the contention that this money should by reason of rule 16 be applied as a charitable fund cy prês; but further than this, I am of opinion that even if the surplus moneys in the applicants' hands were applicable under the rule they would not be dedicated thereunder to charity within the meaning of the authorities. The above also disposes of the contention that the moneys in question should now be distributable as a non-charitable benevolent fund under the rule; and here again it may be observed in passing that if those moneys were now held to form part of that benevolent fund a serious question of perpetuity might arise, as there would be no beneficiaries defined or capable of being defined within the rule who could join together and make a title to the fund: see *In re Clarke.* (1)

The rights, if any, of the representatives of deceased Excise subscribers who died before the amalgamation in 1910 depend upon the true construction of the regulations governing the Excise Fund established in February, 1852, assuming that any part of the moneys now remaining in the hands of the applicants can be deemed to include any "surplus" forming part of the above fund at the date of the amalgamation capable of being the subject of the resulting trust contended for.

These regulations, though issued by the Board of Inland Revenue as distinct from the later rules of the Customs Fund which were prepared and brought into operation at the instance of the Customs subscribers themselves, nevertheless constitute the basis on which the rights of the subscribers to the Excise Fund created thereby depend. They provide for a mutual guarantee fund to be created by subscriptions of a similar character to those provided for in the 1910 rules. They contemplate an increase in the fund (from interest and management) from time to time in excess of the amount required to repay deposits and interest to the subscribers, and they provide that, on the death or retirement of any contributor, the sum then at his credit, including interest, shall be repaid to him or his legal representative. No power is given to alter the regulations and no provision made for terminating or winding up the fund. In practice interest at 2½ per cent. was repaid to and accepted by retiring or deceased subscribers or their representatives, and at the date of the amalgamation in 1910 the amount standing to the credit of the fund, including a surplus of 2800*l.* over liabilities, was handed over to the managers of the new Amalgamated Fund. Subject to the assent of the Board of Inland Revenue, which makes no claim to the surplus existing in 1910, this fund, as in the case of the new fund created at the date of the amalgamation, belonged, in my judgment, for similar reasons to those given above, subject to the guarantee liabilities and to the repayment of deposits and interest, to the surviving subscribers from time to time and in 1910 became part of the Amalgamated Fund and subject to its rules by consent of the then owners and must be dealt with accordingly.

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(1) [1901] 2 Ch. 110, 121.

This disposes of any claim founded on the suggestion of resulting trust by the representatives of Excise subscribers who died before 1910 to the moneys now in question; but I may add that they would also be excluded on a further ground, which is that if the depreciation in the securities in which the funds have been invested down to 1914 is apportioned between the Excise and Customs Funds on the footing that they must be treated as having been kept distinct from 1910 to 1914, that attributable to the Excise Fund exceeds the amount of its surplus over liabilities in 1910 and results in there being now no moneys in hand upon which the resulting trust contended for could operate.

The only remaining question is that relating to the 1040*l.*, the portion of the moneys in the hands of the applicants due to untraceable Customs subscribers. The right to repayment in these cases is one founded on contract, and with the exception of a sum of 17*l.* the whole of the unclaimed moneys became payable in respect of bonds which fell in before the end of 1910. Every effort has been made by the applicants to trace the claimants, but without result, and in my judgment these claims must be treated as barred by time after the expiration of six years from the respective dates when the deposits in question became repayable, and I will declare accordingly.

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For the reasons which I have endeavoured to give I direct that, subject to the above declaration, the funds now in the hands of the applicants be divided subject to the costs of and incident to this order among the subscribers living on December 31, 1914, and the representatives of any since deceased in proportion to the amounts respectively contributed by such subscribers.

Solicitors: *Foss, Bilbrough, Plaskitt & Co.; Treasury Solicitor; Ernest A. Fuller, for E. Brassey, Chester.*

G. R. A.

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Local Government — Housing — Demolition Order — Subsequent Application for Postponement—Undertaking to repair—Discretion of Local Authority—Owner's Specifications—Duty to consider—Housing, Town Planning, &c., Act, 1909 (9 *Edw.* 7, *c.* 44), *s.* 18, *sub-s.* 3.

Sect. 18, sub-s. 3, of the Housing, Town Planning, &c., Act, 1909, enables an owner against whom a demolition order has been made to apply subsequently for postponement of the operation of that order.

In considering whether they will grant that application the local authority must exercise their discretion judicially.

They must give the owner an opportunity of adequately presenting his case, e.g. by furnishing specifications of his proposed works, and must consider whether those proposed works can or will render the premises fit for human habitation.

To decide on ex parte evidence, without considering the owner's specifications, that no works whatever can render the premises fit for human habitation, and consequently to refuse the application in limine, is not a proper exercise of their discretion.

ACTION.

On January 26, 1914, the medical officer of health of Rotherham reported to the defendants' housing committee that eleven houses belonging to the plaintiff's mother, her predecessor in title, were unfit for human habitation. The committee recommended that they should be inspected and that the medical officer should submit reports and specifications to the next meeting.

On February 11, 1914, the medical officer reported that the houses were very defective internally, damp, imperfectly ventilated, and with the sanitary conveniences in a very dilapidated condition. On February 14, 1914, the town clerk gave the owner notice of the report and that the housing committee would on February 23 consider the propriety of making a closing order under the Housing, Town Planning, &c., Act, 1909, s. 17, and that the owner might attend. (1)

On February 23, 1914, the owner's solicitor and her architect attended the committee and stated that the owner would do all necessary repairs, but, having regard to the report of their medical officer and to their inspection of the premises, the committee held they were unfit for human habitation and recommended closing orders until they were rendered fit for that purpose. They also recommended that the medical officer should prepare a specification of work necessary to make the houses fit for human habitation.

On February 25, 1914, the owner's solicitor wrote to the town clerk confirming his previous statement that the owner was prepared to do all necessary repairs without the necessity of any closing orders.

On March 4, 1914, the defendants made the closing orders, whereupon the owner appealed to the Local Government Board under s. 17, sub-s. 3.

The Local Government Board inquiry was held on May 5, 1914. The town clerk pointed out that, having regard to the present condition of the houses, the defendants were bound to make the closing orders, but stated that as soon as the orders became operative they

(1) See note on p. 39, post.

were willing to place at the owner's disposal all the information and particulars they had to assist her to make the houses fit for human habitation.

At this time the corporation had complete lists of defects in their possession. These were dated March 23, 1914, and were made by the medical officer.

At the same inquiry the medical officer on cross-examination by the owner's solicitor said that in his opinion nothing that could be done to the houses would make them fit for human habitation, but this opinion was admittedly irrelevant to the question of the closing orders, which were confirmed by the Local Government Board on July 2, 1914, and then became operative.

On July 27, 1914, the housing committee recommended that vacation notices be served on the tenants.

On February 12, 1915, notice was given to the owner that as the closing orders had remained operative for three months the question of demolition orders would be considered on March 22.

On March 22, 1915, the plaintiff, whose mother was ill, and the solicitor attended the housing committee and showed cause against the making of demolition orders, but the committee recommended that the orders should be made.

On May 3, 1915, the defendants made the demolition orders, which were served on the owner on May 6, 1915, and on May 7 her solicitor wrote to the town clerk stating that the owner was prepared to put the property in order so as to comply with the defendants' requirements, and was making an appointment with her architect to ascertain the cost.

On May 20, 1915, the owner's solicitor wrote to the town clerk stating that he had gone thoroughly into the matter with the architect, that the builder had been instructed to prepare specifications and tender for the work, which would be put in hand as soon as the same were to hand, and that it would be a great assistance if the defendants would say whether the specifications when received complied with their requirements.

On May 28, 1915, the town clerk replied that in his opinion where a local authority had made a demolition order they had no option but to see the order obeyed by demolition of the house, and consequently that any works executed by the owner would be done with full knowledge that the premises would be pulled down when the time for enforcing the demolition order arrived.

On May 31, 1915, the owner's solicitor asked the town clerk for his views on the meaning and application of s. 18, sub-s. 3, which gives the local authority power to postpone the operation of a demolition order.

On June 3, 1915, the town clerk declined to offer any views on the sub-section.

On July 15, 1915, the town clerk wrote that if the owner made application to repair, the medical officer would feel bound to advise the defendants that the property was not capable of being made fit for human habitation, and should be demolished.

On July 16, 1915, the owner's solicitor replied that an application to repair had already been made, and asked that the owner's architect might meet the medical officer on the premises, as it would be a great pity to pull down houses which the architect was prepared to put into proper sanitary condition.

On July 19, 1915, the town clerk replied that he would lay the owner's application to repair before the next housing committee, but until the committee had again considered the matter the medical officer would not be prepared to meet the owner's architect.

On July 26, 1915, the letter of July 16 was read to the housing committee, but the medical officer reported that the houses were incapable of being made fit for human habitation, and the committee recommended accordingly.

On August 10, 1915, the town clerk communicated this decision to the owner's solicitor and required her to carry out the demolition orders.

After further correspondence, in the course of which the defendants threatened to carry out the demolition orders, the plaintiff, who succeeded to the property on November 21, 1915, commenced this action on December 21 for an injunction restraining the defendants from proceeding to enforce or carry out the demolition orders until they had heard and determined according to law the plaintiff's application for postponement of the operation of those orders.

Hon. Frank Russell, K.C., and *Randolph Glen*, for the plaintiff. We admit that the closing and demolition orders were properly made. Our complaint is that the defendants have not properly considered our application for postponement of the operation of the demolition orders under s. 18, sub-s. 3. They probably misread *Lancaster* v. *Burnley Corporation* (1), which merely decides that a closing order once made involves a demolition order unless the defects are remedied. That we do not dispute, but it does not affect our application for postponement under s. 18, sub-s. 3. That application must be considered judicially with a view to a proper exercise of the defendants' discretion: *Local Government Board* v. *Arlidge* (2); *Rex* v. *Brighton Town Council* (3); *In re Taylor* (4); *Rex* v. *Bexhill Corporation.* (5)

In the present case the defendants have adopted a non possumus attitude in the matter. In the first place, they took the view that they had no power to postpone the operation of demolition orders once made. That has coloured their whole procedure. Secondly, they refused to consider our plans or meet our architect because they were advised ex parte by their medical officer that the property was incapable of being made fit for human habitation. Their decision, however bona fide, is not a proper exercise of their discretion under s. 18, sub-s. 3.

Micklem, K.C., and *G. F. Mortimer*, for the defendants. Sect. 18, sub-s. 3, is not an independent section giving the owner any new rights. It is merely a clause of s. 18, which must obviously be read uno flatu. Under sub-s. 1 the local authority must hear the owner when the question of demolition is taken into consideration. If (sub-s. 2) upon that consideration they think that the house has not been rendered fit for habitation and that the necessary steps are not being diligently taken to render it so fit, they must make a demolition order. If, however (sub-s. 3), the owner undertakes to execute forthwith the necessary works, and the local authority consider they will be effective, they may, if they think fit, postpone the operation of the order to give the owner an opportunity of executing them.

Now, notwithstanding the official form of postponement order given in Lumley's Public Health Acts, 8th ed. p. 2427, it is fairly

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(1) [1915] 1 K. B. 259.
(2) [1915] A. C. 120, 132.
(3) (1916) 32 Times L. R. 239.
(4) (1876) 4 Ch. D. 157, 159.
(5) (1911) 75 J. P. 385.

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clear from s. 18 that the postponement must be made, if at all, at the hearing when the order is made. That is the time when the whole matter is gone into in the owner's presence. If, as in the present case, nothing is being done the local authority must make a demolition order, but if the owner then and there gives a satisfactory undertaking which the local authority consider will be effective they may in their absolute discretion postpone the operation of the order. The owner even then has no right to a postponement. He is in mercy, though the local authority would of course act reasonably. Their discretion is analogous to that in *Twickenham Urban Council* v. *Munton.* (1)

If the owner does not apply for and obtain a postponement at the hearing, his only remedy is an appeal to the Local Government Board under sub-s. 4, who under s. 39 may make such order in the matter as they think equitable, and may confirm, vary, or quash the local authority's order as they think just: *Lancaster* v. *Burnley Corporation.* (2) They could obviously take everything into consideration, and could vary the order by making it conditional on the owner's failure to execute the necessary works within a limited time. That being the statutory remedy, the present action is not maintainable: *Pasmore* v. *Oswaldtwistle Urban Council.* (3)

If the plaintiff's contention is correct, then, no matter how carefully the local authority have gone into the matter with the owner's assistance at the hearing, the owner is at any time before actual demolition entitled to reopen the whole matter de novo on a subsequent application for postponement. This was clearly not the intention of s. 18 read as a whole.

Hon. Frank Russell, K.C., in reply. Sect. 39 enables the Local Government Board to confirm, vary, or quash a demolition order, but (semble) it does not authorize them to suspend its operation: *Lancaster* v. *Burnley Corporation.* (4) An appeal under s. 18, sub-s. 4, would therefore have been useless, as the order was properly made. In any case the fact that a particular statutory remedy is provided does not oust the jurisdiction of the Court to restrain a tribunal from acting on a decision arrived at in an improper manner.

(1) [1899] 2 Ch. 603, 605.
(2) [1915] 1 K. B. 259.
(3) [1898] A. C. 387.
(4) [1915] 1 K. B. 259, 269, 270.

Sect. 18, sub-s. 3, gives the owner a locus poenitentiae to apply for the postponement of the operation of a demolition order after it has been made. This is a strikingly different provision from s. 33 of the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70). Under this repealed section everything had to be considered at the hearing, and the local authority on a proper undertaking had power to order the execution of the works within a specified time and postpone making the demolition order until default. But they had no power to postpone the operation of an order once made. Sect. 18, sub-s. 3, was evidently passed to remedy this defect, and to give the owner one more chance of saving his property.

Astbury J. (after stating the facts). Sect. 18, sub-s. 3, of the Housing, Town Planning, &c., Act, 1909, contemplates that the undertaking of the owner to execute the necessary works may be given after the making of the demolition order. In this respect it differs from s. 33 of the Housing of the Working Classes Act, 1890, under which the undertaking must be given before the order was made. Sub-s. 3 was intended to give the owner a further opportunity of putting the premises in a state fit for human habitation. The provision, though subject to the local authority's discretion, is obviously in the owner's favour, because the postponement is mainly for his benefit.

The sub-section means that on an owner undertaking to execute forthwith the works necessary to render the premises fit for human habitation, then if the local authority, having considered the proposed works, consider that they can or will render the premises fit for human habitation they have a discretion to grant a postponement of the operation of the order on the owner's application.

In my judgment they are bound to exercise this discretion judicially. The necessity for its exercise can only arise on the owner's application, which the local authority must determine after giving the owner an opportunity of adequately presenting his case—e.g., by furnishing plans and specifications which the local authority are bound to consider. They can decide their own course of procedure and hear the owner in person or by a representative, or merely consider his plans, but they must at least permit him to present his case for consideration.

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Now the owner's solicitor's letter of May 20, 1915, was a sufficient application and undertaking to bring sub-s. 3 into operation. Unfortunately the town clerk's reply of May 28, 1915, showed that as the defendants' legal adviser he took a wrong view of the sub-section, as he stated in effect that, no matter what works were done, the local authority were bound to carry out the demolition order. This was tantamount to a refusal to consider any specifications so as to enable the defendants to pass a proper judgment on them. Then again the town clerk's letter of July 15, 1915, was tantamount to saying that it was no use for the owner to submit specifications as the medical officer would advise that nothing could render the property fit for human habitation. Then on July 19 he writes that until the housing committee had again considered the matter the medical officer would not be prepared to meet the owner's architect, and on July 26 the committee, without considering the plaintiff's offered specifications, decided on the ex parte evidence of their medical officer that the houses were incapable of being made fit for human habitation. In other words, the defendants practically refused to hear the plaintiff until the matter was decided. The plaintiff was subsequently informed that the property must come down, and the action was started.

The defendants contend that an application under s. 18, sub-s. 3, must be made at or prior to the making of the demolition order. That is not the true construction of the sub-section, which obviously contemplates an application to postpone the operation of an order previously made. This is the official view of the sub-section: see Lumley's Public Health Acts, 8th ed. p. 2427.

The defendants next contend that the plaintiff's only remedy is an appeal to the Local Government Board under sub-s. 4. They point out that under s. 39 the Local Government Board can confirm, vary, or quash the order, and suggest that they can postpone its operation. But that suggestion is doubtful: *Lancaster* v. *Burnley Corporation.* (1) In any case, it is impossible on the construction of s. 18 to hold that an appeal under sub-s. 4 is the plaintiff's only remedy. The express object of sub-s. 3 is to give the owner the right to apply for postponement of the operation of an order properly made at the time instead of appealing against it.

(1) [1915] 1 K. B. 259, 269, 270.

That being so, I have now to decide on the loose language of sub-s. 3 whether it involves a decision inter partes in which the local authority must permit the owner to present his case. It gives a wide discretion to the local authority, but before exercising that discretion they must consider whether the house can be rendered fit for human habitation by the proposed works. The sub-section involves three things: (*a*) An application by the owner for a decision by the local authority; (*b*) an undertaking by the owner to execute the necessary works; (*c*) an obligation on the local authority to consider the particular works the owner undertakes to execute. The local authority are not entitled to refuse to consider the owner's plans and specifications because in their opinion, no matter what they are, the premises cannot be rendered fit for human habitation. They may be perfectly honest, and possibly right, in their view, and they may so decide after seeing the owner's plans and specifications. But to decide without seeing them is not a proper exercise of discretion.

Now here the defendants have taken the attitude, first, that whether the premises were made fit or not the demolition order would have to be carried out, and, secondly, that it was useless to submit plans or specifications because the medical officer ex parte advised that it was impossible to make the houses fit for human habitation. The second point may be right in substance. It is impossible to say without further evidence, and neither side has called any witnesses. But it is not a proper exercise of the defendants' discretion under sub-s. 3, and the injunction must go accordingly.

Solicitors: *Pitman & Sons, for Chambers & Son, Sheffield; Smith, Rundell & Dods, for Charles L. des Forges, Rotherham.*

NOTE.—The Housing, Town Planning, &c., Act, 1909, provides as follows:—

Sect. 17, sub-s. 1: "It shall be the duty of every local authority . . . . to cause to be made from time to time inspection of their district, with a view to ascertain whether any dwelling-house therein is . . . . unfit for human habitation . . . ."

Sub-s. 2: "If . . . . any dwelling-house appears to them to be in such a state, it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose."

Sub-s. 3: "Notice of a closing order shall be forthwith served on every owner . . . . and any owner aggrieved by the order may appeal to the Local Government Board by giving notice of appeal to the Board within fourteen days after the order is served upon him."

Sub-s. 4: "Where a closing order has become operative, the local authority shall serve notice of the order on every occupying tenant . . . . and he and his family shall cease to inhabit the dwelling-house . . . ."

Sub-s. 6: "The local authority shall determine any closing order . . . . if they are satisfied that the dwelling-house . . . . has been rendered fit for human habitation. If, on the application of any owner . . . . the local authority refuse to determine a closing order, the owner may appeal to the Local Government Board by giving notice of appeal to the Board within fourteen days after the application is refused."

Sect. 18, sub-s. 1: "Where a closing order . . . . has remained operative for a period of three months, the local authority shall take into consideration the question of the demolition of the dwelling-house, and shall give every owner . . . . notice of the time . . . . and place at which the question will be considered, and any owner . . . . shall be entitled to be heard when the question is so taken into consideration."

Sub-s. 2: "If upon any such consideration the local authority are of opinion that the dwelling-house has not been rendered fit for human habitation, and that the necessary steps are not being taken with all due diligence to render it so fit . . . . they shall order the demolition of the building."

Sub-s. 3: "If any owner undertakes to execute forthwith the works necessary to render the dwelling-house fit for human habitation, and the local authority consider that it can be so rendered fit for human habitation, the local authority may, if they think fit, postpone the operation of the order for such time, not exceeding six months, as they think sufficient for the purpose of giving the owner an opportunity of executing the necessary works."

Sub-s. 4: "Notice of an order for the demolition of a building shall be forthwith served on every owner . . . . and any owner aggrieved by the order may appeal to the Local Government Board by giving notice of appeal to the Board within twenty-one days after the order is served upon him."

G. R. A.

McLAREN *v.* THOMSON.

[1917 M. 479.]

ASTBURY J.
1917
April 17, 24.

Company—Meeting—Proxies to be lodged two Days before Meeting—Adjournment of Meeting—Subsequent Proxies lodged before adjourned Meeting—Validity.

A company's articles enabled members to vote by proxy, but provided (article 72) that "The instrument appointing a proxy shall be deposited at the registered office of the company not less than two clear days before the day for holding the meeting at which the person named in such instrument proposes to vote":—

Held, that proxies lodged between the dates of an original meeting and the adjournment thereof were invalid, the adjourned meeting being in law merely a continuation of the original meeting.

Scadding v. *Lorant* (1851) 3 H. L. C. 418 applied.

Motion.

The City of Chicago Brewing and Malting Company, Limited, was incorporated on June 2, 1890, with a capital of 1,250,000*l.* divided into 62,500 preference shares of 10*l.* each and 62,500 ordinary shares of 10*l.* each, which were all issued and fully paid.

The plaintiff McLaren held fifty preference shares, the plaintiff Wilkinson forty ordinary shares, and the plaintiff Sturdy 4000 preference and 250 ordinary shares.

Articles 46, 47, and 48 provided that the first ordinary general meeting should be held not more than four months after registration, and a subsequent ordinary general meeting should be held once in every year after the year of incorporation.

Article 52 provided that seven days' notice of any general meeting should be given to the members.

Article 53 provided that the notice convening an ordinary general meeting should state the general nature of any business intended to be transacted thereat, other than declaring dividends, electing directors and auditors and voting their remuneration, and considering the accounts presented by the board, and the reports of the board and the auditors.

Articles 54 and 55 provided that five members should be a quorum, and if within half an hour from the time appointed for an ordinary general meeting a quorum was not present the meeting should stand adjourned to a day in the next week to be appointed by the chairman.

Article 56 provided that at any adjourned meeting the members present and entitled to vote should have power to decide upon all matters which could properly have been disposed of at the meeting from which the adjournment took place.

Article 59 provided that the chairman might with the consent of the meeting adjourn any general meeting, but no business should be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place.

Articles 60—64 contained provisions as to voting by show of hands and by poll.

Articles 65 and 66 provided that every member should have one vote in respect of each share and might vote personally or by proxy, who (article 71) must be a member.

Article 72 provided that "The instrument appointing a proxy shall be deposited at the registered office of the company not less than two clear days before the day for holding the meeting at which the person named in such instrument proposes to vote."

Article 79 provided that no person other than a retiring director should be elected a director unless at least four and not more than seven clear days' notice of the intention to propose him should have been left at the registered office.

Articles 95 to 99 contained provisions as to the retirement and re-election of directors.

Article 105 provided that at the ordinary general meeting in every year the board should submit to the members a balance-sheet and profit and loss account, made up to as recent a date as practicable, and audited as thereinafter provided, accompanied by a report from the board on the transactions of the company during the period covered by such accounts.

Article 106 provided that a printed copy of such balance-sheet, account, and report should, seven days previously to the meeting, be sent to the members.

In December, 1916, the sole directors of the company were the defendants Thomson, Cairns, and Pennington, and it was Pennington's turn to retire.

On December 20, 1916, the secretary gave due notice that the ordinary general meeting would be held on December 30 to receive and, if approved, adopt the directors' report and statement of accounts and to elect a director and auditors. A note was appended stating that the American audited accounts, though posted, had not yet been received, owing to transit delays. In these circumstances it would be necessary formally to adjourn the meeting to an early date in January, due notice of which would be sent to the shareholders, when the directors' report and statement of accounts would be submitted.

On December 23, 1916, the plaintiff McLaren gave the secretary formal notice of intention to propose resolutions (inter alia) appointing the three plaintiffs as directors. This notice was duly acknowledged on the same day and subsequently communicated to the shareholders.

On December 27, 1916, the plaintiff McLaren lodged 129 proxies with an aggregate voting power of 24,181 in respect of 12,075 preference and 12,106 ordinary shares, authorizing the proxies to vote at the ordinary general meeting of December 30, 1916, and at any adjournment thereof, adopting the form in Table A, art. 67.

The ordinary general meeting was held on December 30, 1916, but no business was transacted, the meeting being formally adjourned till a date to be subsequently named.

On January 11, 1917, the secretary gave due notice that the adjourned ordinary general meeting would be held on January 24. The directors' report and statement of accounts were for the first time circulated with this notice, and this was the first notification that Pennington was the retiring director and offered himself for re-election. McLaren's notice of intention to propose the plaintiffs was also circulated.

On January 19, 1917, the plaintiff McLaren lodged nineteen further proxies representing 20,304 votes in respect of 12,949 preference and 7355 ordinary shares, making with the former proxies 44,485 votes, authorizing the proxies to vote at the ordinary general meeting of December 30, 1916, and at any adjournment thereof. The secretary acknowledged the receipt of the latter proxies, but contended that they ought to have been lodged two days before the original meeting.

At the adjourned ordinary general meeting on January 24, 1917, it was resolved that the number of directors be increased to five, but polls were demanded on certain resolutions, including (*a*) a resolution re-electing Pennington, and (*b*) a resolution electing the plaintiffs.

A scrutiny of the votes showed that if the plaintiffs' second set of proxies were rejected Pennington was re-elected and the plaintiffs were not elected. On the other hand, if the plaintiffs' second set of proxies were admitted, Pennington was refused re-election and the plaintiffs were elected.

The chairman of the meeting, on the advice of the company's solicitors, took the former view and declared the result of the poll accordingly. This was communicated to the shareholders by a printed postcard of February 21, 1917.

On March 21, 1917, the plaintiffs brought this action against the defendants Thomson, Cairns, Pennington, and the company for declarations that the plaintiffs were elected directors, and that Pennington was not re-elected, and for injunctions restraining the personal defendants from representing that the plaintiffs were not elected and were not directors, and from excluding them from acting as directors, and restraining Pennington from continuing to act as director.

On March 22, 1917, the plaintiffs served a notice of motion asking for the injunctions until trial.

Micklem, K.C., and *Stuart Bevan*, for the plaintiffs. Article 72 must be read with articles 56 and 59, which show that, at all events for the purpose of voting, an adjourned meeting is treated as a separate meeting and not as a mere continuation of the original meeting, which of course it is for some purposes—e.g., notice of business and so on. Modern proxy articles often require proxies to be lodged forty-eight hours before the meeting "or adjourned meeting as the case may be," but the latter words are not really necessary: Palmer's Company Precedents, 11th ed. pt. i. pp. 692, 706, 856. The object of the article is only to give time for the examination of the proxies. That is satisfied if they are lodged forty-eight hours before they are used. Why should a man who attends the original meeting in person, but is unable to attend the adjournment, be disfranchised? In the present case it would be a great hardship to hold that members were bound to give proxies before the balance-sheet, account, and report had been sent under article 106. These were not sent out until January 11, 1917. There is no authority directly in point. *Shaw* v. *Tati Concessions* (1), following *Reg.* v. *Wimbledon Local Board* (2), merely shows that a poll is not an adjourned meeting. *Catesby* v. *Burnett* (3) turned on the meaning of "day of election" in article 62. In *In re Caratal (New) Mines* (4) Buckley J. said "If a poll had been demanded . . . . other people might have given proxies . . . ."; but it is possible that in that case the proxy article was in the modern form.

Hon. Frank Russell, K.C., and *H. E. Wright*, for the defendants. The motion is misconceived. No matter how many times it was adjourned, or how many days it lasted, there was only one meeting which began on December 30, 1916: *Scadding* v. *Lorant* (5); and under article 72 proxies not lodged two days before that date were invalid. That was the condition on which the right to vote by proxy was given. Articles 105 and 106 are not statutory requirements. They are merely contractual between the members. There is no real hardship in their non-observance. Prudent shareholders could have given open proxies and told their nominees how to vote when they had seen the balance-sheet, account, and report.

The principle underlying the plaintiffs' contention, namely, that of enabling every member to express his views by proxy at an adjourned meeting, would equally apply to enabling him to express his views at a postponed poll and to lodge proxies in time for that poll. But that is directly contrary to *Shaw* v. *Tati Concessions* (1), which shows that these enabling proxy articles must be construed very strictly.

Micklem, K.C., in reply.

Cur. adv. vult.

April 24. Astbury J., after stating the facts and referring to the articles, under which the ordinary general meeting had to be held in 1916, and pointing out that article 72, which was in substance the same as art. 66 of Table A, conferred no express right to lodge

(1) [1913] 1 Ch. 292.

(2) (1882) 8 Q. B. D. 459.

(3) [1916] 2 Ch. 325.

(4) [1902] 2 Ch. 498, 501.

(5) 3 H. L. C. 418, 446, 447.

independent proxies for an adjourned meeting, as was common in recent forms of articles, and that articles 56 and 59 showed that an adjourned meeting was not a separate general meeting in the sense used in the articles, continued: An adjourned meeting when held is a continuation of the meeting from which the adjournment takes place: *Scadding* v. *Lorant* (1); and, unless the meeting of January 24 is so regarded, it was irregular and out of time under the articles. The plaintiffs, in framing their notice of December 23 and by voting for their own election in January, acted on this view.

This being so, the question for determination is whether an adjournment or continuation of an ordinary general meeting called for an earlier day is a meeting separate and distinct from that of which it is the continuation, within the meaning of article 72 in these particular articles—whether, in other words, the ordinary general meeting called for and begun on one day in December, 1916, and continued on another in January, 1917, is the ordinary general meeting for the year 1916, or whether the 1916 meeting and another meeting in January, 1917, which was not an annual general meeting for that year, must be deemed to have taken place, in respect of both of which proxies could have been lodged under the articles.

There is no inherent or equitable right in any shareholder to vote by proxy; such right, if it exists, must be found in the contract binding the shareholders generally, that is in the company's regulations or constitution, and it then exists only in the form and subject to the limitations therein appearing. There is no room for contending that an appointment of a proxy, irregularly made, is within the spirit or equity of any inchoate right so to vote existing in the shareholder; he has either complied with the terms of the contract upon which alone the right is based or he has not. Prima facie a provision that a proxy must be lodged before the day for holding or before the time for holding a meeting means that it must be lodged before the beginning and not before the end of the gathering. If the plaintiffs' contention were to prevail, a group of shareholders having given notice of an intention to propose an extraordinary resolution at a particular meeting, and having only a bare majority, could use that majority to obtain an adjournment to enable them to make use of proxies too late for the meeting. For such a right

(1) 3 H. L. C. 418, 446, 447.

to exist express provision would be, and I think ought to be, necessary.

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Having regard to the articles of this company as a whole, I think that the continuation in January of the ordinary general meeting of December 30 was not "a meeting" within the meaning of article 72 for which proxies too late for the commencement of the meeting could be used, and that for the reasons I have stated the decision of the chairman of the meeting in this case was correct. The motion must be dismissed with costs.

Solicitors: *Charles Thomas Wilkinson; Ashurst, Morris, Crisp & Co.*

G. R. A.

HOLLIDAY *v.* LOCKWOOD.

[1916 H. 1892.]

ASTBURY J.
1917
April 27, 30;
May 1.

Vendor and Purchaser—Sale in Lots—Purchase of Two Lots—Separate Contracts—Innocent Misrepresentation by Vendor as to second Lot—Purchaser's Right to rescind as to both Lots—Liability to Specific Performance as to first Lot.

Where a purchaser separately acquires two lots of property at an auction, in reliance on an innocent misrepresentation of the vendor as to the second lot, entitling the purchaser to rescission as to that lot, he cannot also rescind the contract for the first lot, unless from the circumstances known and understood by both parties at the time of sale the Court can infer that the two transactions were to the knowledge of both interdependent.

If, however, the Court is satisfied that, apart from the misrepresentation, the particular purchaser would not have bought either lot, it will refuse the vendor specific performance as to the first lot.

Casamajor v. *Strode* (1834), 2 My. & K. 706, 724—731, and *Dykes* v. *Blake* (1838), 4 Bing. N. C. 463, 477, discussed and explained.

WITNESS ACTION.

On July 18, 1916, the defendant put up certain freehold properties for sale by auction in three lots. Lot 2 was described in the advertisement and in the particulars as a freehold farm, including a residence, farm buildings, and land comprising 92 acres. Lot 3, which adjoined lot 2, was described as a freehold sporting estate with a shooting-box, farm buildings, and moorland comprising 191 acres.

The plaintiff saw the advertisement, and, being desirous of combining farming and shooting, went to the sale-room and interviewed the auctioneer half an hour before the sale. The main conversation was about lot 3, on which the auctioneer said 100 brace of grouse had been shot in one season, and that was the average bag. The auctioneer also produced a plan, and pointed out that as lot 2, on which birds were also shot, was contiguous to and jutted into lot 3, it would be expedient for the purchaser of lot 3 to acquire lot 2.

The plaintiff, without telling the auctioneer of his intention, resolved to acquire both lots and to put a gamekeeper in the residence on lot 2 and use the shooting-box on lot 3 for week-ends for himself and his family. The statements as to birds being shot on lot 2 and 100 brace being the average bag on lot 3 were repeated at the auction. In reliance on the latter statement, which induced the plaintiff to bid for both properties, the plaintiff successively bid for and purchased lot 2 for 2000*l.* and lot 3 for 3000*l.* He signed two contracts of purchase and paid a deposit of 200*l.* on lot 2 and 300*l.* on lot 3.

The next day the plaintiff ascertained that owing to an innocent mistake of the auctioneer and the defendant the average bag on lot 3 had been greatly overstated, the birds having in fact been shot on adjoining land formerly belonging to the defendant.

The plaintiff, who had only bought lot 2 as an adjunct to lot 3, merely taking the small risk of the latter lot being withdrawn or bought over his head, in which case he would not have repudiated lot 2, at once repudiated both contracts and asked for the return of the deposits.

The defendant admitted the innocent misrepresentation as to lot 3 and returned the 300*l.* deposit, but he refused to return the 200*l.* deposit on lot 2 on the ground that it was bought by a separate contract unaffected by the misrepresentation as to lot 3.

On October 9, 1916, the plaintiff commenced this action for rescission of the contract as to lot 2 and return of the 200*l.* deposit.

The defendant counterclaimed for specific performance or damages.

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Hon. Frank Russell, K.C., and *Owen Thompson*, for the plaintiff. In ordinary cases of sale by auction each lot is treated as sold by a separate contract: *Poole* v. *Shergold* (1); *Buckmaster* v. *Harrop* (2); *Emmerson* v. *Heelis* (3); *James* v. *Shore* (4); *Lewin* v. *Guest* (5); *Roots* v. *Lord Dormer* (6); *Seaton* v. *Booth.* (7) But where from facts known to both parties, such as the nature and situation of the lots, especially if coupled with statements of the vendor, the Court can infer that one transaction was dependent on the other, the transactions are "complicated" and the two contracts are treated as one. The possibility of such a complication was recognized in *Poole* v. *Shergold* (1), and the doctrine was probably applied in *Chambers* v. *Griffiths* (8) and *Gibson* v. *Spurrier* (9), though the facts as reported hardly warranted its application. The doctrine was also recognized or applied in cases of opening biddings on Court sales: *Boyer* v. *Blackwell* (10); *Ex parte Tilsley* (11); *Price* v. *Price.* (12) In *Roffey* v. *Shallcross* (13) two undivided sevenths were sold in one lot, so that the case is not in point.

Most of these cases were reviewed by Lord Brougham in *Casamajor* v. *Strode* (14), where the requisites of legal complication are fully explained.

In *Dykes* v. *Blake* (15) the purchaser of lots 12 and 13 was allowed to rescind as to both lots owing to a misrepresentation as to lot 13. Tindal C.J. based his decision on two independent grounds—namely, (*a*) that the two lots had been put into one contract at the aggregate price; and (*b*) that upon the facts the purchaser might be reasonably understood to have purchased lot 12 in order to enhance the value of lot 13. The second ground which is stated as the basis of the decision in Sugden on Vendors and Purchasers, 14th ed. p. 320, completely covers the present case.

(1) (1786) 2 Bro. C. C. 118; 1 Cox, 273.

(2) (1802) 7 Ves. 341, 346; (1807) 13 Ves. 456, 474.

(3) (1809) 2 Taunt. 38, 47.

(4) (1816) 1 Stark. 426.

(5) (1826) 1 Russ. 325, 330.

(6) (1832) 4 B. & Ad. 77.

(7) (1836) 4 Ad. & E. 528, 536.

(8) (1794) 1 Esp. 150.

(9) (1795) Peake, Add. Cas. 49.

(10) (1796) 3 Anst. 656.

(11) (1819) 4 Madd. 227, n.

(12) (1823) 1 S. & S. 386.

(13) (1819) 4 Madd. 227.

(14) 2 My. & K. 706, 722, 724—730.

(15) 4 Bing. N. C. 463, 477.

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Even if the plaintiff fails in obtaining rescission, he can resist specific performance: *Scott* v. *Alvarez.* (1)

Micklem, K.C., and *W. A. Peck*, for the defendant. There was clearly no physical complication, and the auctioneer's expression of opinion that the purchaser of lot 3 ought to acquire lot 2 did not constitute a complication within the authorities. No doubt the plaintiff meant to acquire both lots, so as to combine farming and shooting. But his motive was quite immaterial, unless it was expressed in the contract: *Shirley* v. *Davis* (2), referred to by Lord Eldon in *Drewe* v. *Hanson* (3); *Boehm* v. *Wood.* (4)

Again, the order in which the lots are purchased is very material: *Price* v. *Price* (5), where the purchaser was let off the subsequent lot. In *Casamajor* v. *Strode* (6) the application related to the subsequent lot, and the purchaser was ultimately let off by consent. The present plaintiff seeks to be let off the prior lot 2. How could the subsequent purchase of lot 3 affect that, unless there was some complication recognized and assented to by both parties? In the present case the complication, if any, existed simply in the plaintiff's mind.

In *Dykes* v. *Blake* (7) the two lots were put into one contract, showing that both parties treated them as connected. That was the real ground of the decision: Fry on Specific Performance, 5th ed. p. 405. In the present case the contracts were separate, and there was no complication known to both parties. The plaintiff's private intention to acquire both does not complicate them: Farrer on Conditions of Sale, 2nd ed. pp. 283—285, where the authorities are fully reviewed; nor is it a ground for resisting specific performance: Fry on Specific Performance, 5th ed. p. 19; *Haywood* v. *Cope.* (8) In *Van Praagh* v. *Everidge* (9) specific performance was enforced against a purchaser who bid for the wrong lot by mistake.

Hon. Frank Russell, K.C., in reply. Lord Eldon's reference to *Shirley* v. *Davis* (2) is inaccurate. The decision was the other way: vide the note to *Shirley* v. *Stratton* (10) and Fry on Specific Perform-

(1) [1895] 2 Ch. 603.
(2) (1788) 6 Ves. 678.
(3) (1802) 6 Ves. 675.
(4) (1820) 1 Jac. & W. 419, 422.
(5) 1 S. & S. 386.
(6) 2 My. & K. 722, 727, 731.
(7) 4 Bing. N. C. 463, 477.
(8) (1858) 25 Beav. 140, 151.
(9) [1902] 2 Ch. 266.
(10) (1785) 1 Bro. C. C. 440.

ance, 5th ed. p. 602. In *Malins* v. *Freeman* (1) a purchaser who bought the wrong lot by mistake successfully resisted specific performance. In the present case the plaintiff would not have bid at all, had it not been for the innocent misrepresentation as to lot 3. Even if he is not entitled to rescission, it would be inequitable to decree specific performance.

Astbury J., after stating the facts. The plaintiff claims to rescind the contract for lot 2 on the ground that lots 2 and 3 are so complicated together within the authorities as to entitle him to rescind as to either lot if he cannot have both. Curiously enough there are no modern authorities, and with the exception of *Dykes* v. *Blake* (2) and a few other cases the authorities are all reviewed in *Casamajor* v. *Strode.* (3) In that case the purchaser bought lots 25 and 30. The vendor was unable to make a title to lot 25, and the purchaser claimed to be released from the contract as to lot 30 as well. Lord Brougham, after holding that the matter could not be determined on the purchaser's application by motion, proceeded to discuss the authorities. After referring to *Chambers* v. *Griffiths* (4), where Lord Kenyon is reported to have held that the purchaser of several distinct lots, the title to one of which failed, was at liberty to repudiate the whole, he said: "This is not a sound doctrine at law any more than in equity"; and pointed out that the report of *Chambers* v. *Griffiths* (4), which was plainly overruled in *Roots* v. *Lord Dormer* (5), was not to be relied upon. He then proceeded: "If Lord Kenyon's reported opinion, but which he probably never held, carried the rule so much too far in favour of the purchaser, perhaps an opinion ascribed to Lord Eldon, and mentioned in Sir Edward Sugden's Treatise on Vendors and Purchasers, and in the note to *Roffey* v. *Shallcross* (6), carries the rule almost as far the other way—that the purchasers of different lots are not to be connected together, unless there has been an understanding that the buyer should not take any if he could not have all. Clearly such an understanding will suffice to blend the whole into one contract; but it seems equally clear that the same complication may be effected, or rather evidenced, without any such understanding; that is, without any express agreement to this effect. It is a question of circumstances; the lots may be connected from their nature; it may be shewn that the purchase of the one was made with reference to the other. A mere suggestion of the party, a mere statement of his inclination, or fancy, will not be sufficient; nor may the proof of any thing of a private nature, not known to the vendor, suffice; but where, upon matters known to both parties, he can ground his proof that the one transaction was dependent on the other, he complicates the two, so as to make the contract one, although there may have been no express statement that he was to take none if he might not have all. It is further to be observed, that Lord Eldon decided contrary to the opinion referred to in *Ex parte Tilsley.* (1) . . . . It may therefore be concluded, that in determining whether a purchaser who fails to obtain a good title to one lot, shall be let off from his contract for another, the whole circumstances may be examined in order to prove that the two contracts are one, by shewing that the two parcels are complicated together, and that upon the whole transaction the Court will determine as a jury would, the question, did or did not the party purchase the one with reference to the other; would he or would he not have taken the one, had he not reckoned upon also having the other."

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(1) (1837) 2 Keen, 25.
(2) 4 Bing. N. C. 463, 477.
(3) 2 My. & K. 706, 722, 724—730.
(4) 1 Esp. 150.
(5) 4 B. & Ad. 77.
(6) 4 Madd. 227.

Giving the best attention I can to these observations, I think the meaning is this: The mere fact that one lot is contiguous to another, or that a particular purchaser in his own mind resolves to purchase two lots because he thinks he can conveniently occupy them together, is not sufficient to complicate them within the old authorities. Of course, if the vendor and purchaser agree to treat them as so complicated, the matter is different, and "where, upon matters known to both parties"—i.e., where by the situation, description, or circumstances known and understood by both parties at the time of sale—the Court can draw the inference that one transaction depends on the other owing to matters known to both parties, in that case there is a complication making one contract out of the two. "The whole circumstances may be examined in order to prove that the two contracts are one"—i.e., to the knowledge of both parties. "The Court will determine as a jury would, the question, did or did not the party purchase the one with reference to the other; would he or would he not have taken the one, had he not reckoned upon also having the other." That refers to cases where there is sufficient in the circumstances known to both parties to make the two transactions interdependent, and not to the mere inclination or motive of one party to acquire both lots or neither.

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(1) 4 Madd. 227, n.

In *Dykes* v. *Blake* (1), the nearest authority to the present case, lot 13 was described as a building plot subject to certain rights of way in favour of a cottage property forming lot 12, and to a right of carriage-way in favour of a crescent of houses forming lots 7—10, but the fact that the crescent houses had a separate right of footway over lot 13 was not disclosed. The purchaser bought lots 12 and 13 presumably intending to enhance the value of lot 13 by extinguishing the right of way belonging to lot 12. The lots were included in one contract. On discovering that the crescent houses had a right of footway over lot 13 the purchaser repudiated the contract as to both lots and brought an action to recover the deposit. The question was whether he was entitled to rescind as to lot 13 and also lot 12. Tindal C.J., after holding that the misdescription was sufficient to entitle the plaintiff to rescission as to lot 13, continued: "Although it has been argued that the objection can apply at most to lot 13, and that the purchaser of lot 12 can have no right to rescind that purchase by reason of the misdescription in the lot 13, we answer, that in this case the seller has been contented to treat the two purchases as one contract, by entering into one agreement for the sale of both at once at the aggregate price; and secondly, that the purchaser of lot 12, upon the facts of this case, may be reasonably understood to have purchased lot 12 in order that he might, by unity of seisin, extinguish the right of way over lot 13, which before belonged to lot 12, and thereby render lot 13 more valuable as building ground; an object and purpose which is entirely defeated by the existence of the [undisclosed] right of way."

The question is whether Tindal C.J. intended to define two separate grounds on either of which the purchaser was entitled to rescind, or was he merely describing a composite ground. On the whole I incline to the latter view, though some authorities—e.g., Sugden's Vendors and Purchasers, 14th ed. p. 320—take the former view. If my view is correct, the authority is not of much assistance in the present case. If, on the other hand, Tindal C.J. based his judgment on alternative grounds it is very like the present case, and the principle underlying the second ground requires very careful consideration, as it is not clear that it does not go considerably beyond Lord Brougham's observations in *Casamajor* v. *Strode.* (1) The second ground, if a separate ground, was that "the purchaser of lot 12 upon the facts . . . . may be reasonably understood to have purchased lot 12 in order that he might . . . . extinguish the right of way over lot 13 . . . . and thereby render lot 13 more valuable as building ground . . . ." Now it is clear that the particular purchaser's mere motive or determination to buy one lot in order to enhance the value of another is not a sufficient complication of the lots within the authorities. It is possible that the second ground was intended to be limited to cases where, having regard to the vendor's representations and description of the property, the Court could infer that an ordinary as distinguished from the particular purchaser would have been led to take the view that, in order to enjoy one lot for the purposes for which it was sold, it was desirable to purchase another also. In that case the contracts could be regarded as one, but unless read with some such restriction Tindal C.J.'s second ground was too wide.

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(1) 4 Bing. N. C. 463, 477.

In Sugden on Vendors and Purchasers, 14th ed. p. 319, the author states that "Where an estate is sold . . . . in lots, and the vendor has not a title to all the lots sold, equity will compel the purchaser to take the lots to which a title can be made, if they are not complicated with the rest . . . . But if a title cannot be made to a lot which is complicated with the rest, the purchaser will not be compelled to accept the lots to which a title can be made . . . . Even a Court of law is at liberty to look at the nature of the property, and will permit a purchaser to rescind the contract as to all the lots if a title cannot be made to any which are necessary to the enjoyment of the rest, although a distinct contract arises upon each lot." That statement is eminently right. The author then places *Gibson* v. *Spurrier* (2) under this head, though the report does not in fact state whether the particulars fixed the vendor with knowledge that one lot was necessary to the enjoyment of the other. He then

(1) 2 My. & K. 706, 722, 724—730.

(2) Peake, Add. Cas. 49.

states *Dykes* v. *Blake* (1), treating it as decided on the second ground stated in the judgment.

In Fry on Specific Performance, 5th ed. p. 404, on the other hand, the authorities are dealt with as follows: "After some vacillation in the older cases, it has been decided at common law, that where property is sold in distinct lots, there is a separate contract for each lot . . . . And in equity the same is prima facie the case, so that, in the absence of special circumstances, a vendor is entitled to compel the purchaser of two lots to complete his purchase of the one, though he may fail in making out a title to the other. But where from the nature of the contract, or the property that is the subject of it, or upon matters known to both parties, one of them can prove that the one transaction was dependent on the other, the two form one contract, although there may be no express statement to that effect. And the parties by their subsequent dealing may convert two or more distinct contracts into an entire one, as by entering into one contract for the sale of the several subject-matters at one aggregate price."

The last sentence is based on *Dykes* v. *Blake* (1), and I prefer that view of the ground of Tindal C.J.'s decision rather than the one stated in Sugden on Vendors and Purchasers, 14th ed. p. 320.

Prima facie on a sale by auction there is a separate transaction in respect of each lot unless the case is brought within the recognized exception. The point may arise in an action for rescission or as a defence to a claim for specific performance. If the lots are not complicated by reason of facts known to both parties, the right of rescission does not arise. If, on the other hand, the particular purchaser's decision to buy lot A in order to enjoy lot B arises from the representations of the vendor as to lot B, it may be a defence to a specific performance action as to lot A.

In the ordinary way the motive of one party in entering into a contract is irrelevant unless it is expressed and assented to by the other party. Again, one party to a contract cannot set up his own private understanding thereof against the written contract: *Tamplin* v. *James* (2); Fry on Specific Performance, 5th ed. p. 380.

The first question, therefore, in the present case is whether the two lots were within the knowledge of both parties so complicated

(1) 4 Bing. N. C. 463, 477.

(2) (1880) 15 Ch. D. 215.

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as to justify the purchaser in rescinding the contract as to lot 2 on the ground of the misrepresentation as to lot 3.

Now the advertisements and particulars do not complicate these two lots. The mere fact that they are contiguous and that lot 2 juts to a small extent into lot 3 is not sufficient to create a legal complication within the authorities. The plaintiff, however, contends that the auctioneer, by pointing out that the lots were contiguous, that there was shooting on both, and that the purchaser of lot 3 ought to acquire lot 2, recognized the complication as the defendant's agent, and led the plaintiff to bid on this footing. But the fact that the lots were contiguous, and that the purchaser of lot 2 might get an occasional shot at birds coming from lot 3, was obvious from the plan, so that in this respect the auctioneer's observations were unimportant.

The only difficulty (if any) arises from the fact that the auctioneer, knowing that the plaintiff wanted a shooting estate, said that the purchaser of lot 3 ought to buy lot 2. On the whole I do not think this is sufficient to complicate the properties within the authorities. It was a mere expression of the auctioneer's opinion that the purchaser of lot 3 would be wise in buying lot 2. It does not justify the purchaser of lot 2 in saying that lot 2 was admittedly complicated with, and the enjoyment thereof depended on, the acquisition of lot 3, or vice versa. It is clear that the shooting on lot 3 could be enjoyed without acquiring lot 2, and the farming on lot 2 could be enjoyed without acquiring lot 3. The plaintiff bought lot 2 because he really wanted both a farming and a shooting estate, and on the whole I do not think there is sufficient interdependence and complication in the two lots to justify him in rescinding his contract as to lot 2 because of the misrepresentation under which the contract as to lot 3 has been rescinded. The claim for rescission therefore fails.

The next question is whether I ought to allow the defendant's counterclaim for specific performance. The result of the authorities is stated in Fry on Specific Performance, 5th ed. p. 19: "If the defendant [to a specific performance action] can show any circumstances dehors, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of Equity, having satisfactory information upon that subject, will not

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interpose . . . . But of the circumstances calling for the exercise of this discretion, the Court judges by settled and fixed rules; hence the discretion is . . . . judicial . . . . The mere hardness of the results will not affect the discretion of the Court."

The fact that the plaintiff really wanted to purchase both lots, and that it would be a hardship to make him take only one, is not conclusive. But on the whole I think the fairest thing is to refuse specific performance. It is not at all clear that, apart from the representation as to the shooting on lot 3, the plaintiff would have bid for either lot. He bid for lot 2, and admittedly took the risk of getting that lot by itself if lot 3 were withdrawn or bought over his head, but on the whole I think he was induced to purchase lot 2 by the innocent misrepresentation as to lot 3. I therefore refuse specific performance, and as there is no evidence that the defendant has suffered any damage, the action and the counterclaim will be dismissed without costs.

Solicitors: *Rawle, Johnstone & Co., for Ramsden, Sykes & Ramsden, Huddersfield; Iliffe, Henley & Sweet, for Laycock, Dyson & Laycock, Huddersfield.*

G. R. A.

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1917
April 17, 18.

In re MACKENZIE.

THORNTON *v.* HUDDLESTON.

[1917 M. 350.]

Settlement—Special Power of Appointment—Will—General Bequest of Property upon Trusts for Objects of Power—General Reference to Powers—Charge of Debts—Power executed—Evidence—Settlement Trustees entitled to retain Trust Funds.

A married woman, having a power by deed or will to appoint settled trust funds in favour of her issue, made her will as follows: "I give devise and bequeath all my property of any description including any property over which I may have a power of appointment" unto trustees upon trust for sale and conversion, and thereout to pay her debts, and to hold the residue upon trusts for her daughter for life, with remainder to the daughter's children at twenty-one or marriage. The testatrix had no property of her own:—

Held, that the will executed the special power, the charge of debts being ineffectual.

Held, also, that the trustees of the will were not entitled to a transfer from the settlement trustees of the settled trust funds, but that the latter were entitled to retain and hold the same upon the trusts of the will.

Busk v. *Aldam* (1874) L. R. 19 Eq. 16 followed.

Held, also, the fact that the testatrix had no property was admissible as evidence of surrounding circumstances from which an intention to execute the power might be inferred.

Adjourned Summons.

By a deed dated July 24, 1878 (being the settlement made on the marriage of John Mackenzie with Louise his wife), certain funds were settled upon trusts to pay the income thereof to the said Louise Mackenzie during her life, and after her death to hold the same in trust as she should by deed or will appoint, and in default of appointment in trust for her next of kin under the statutes for distribution as though she had died intestate and without having been married.

There was issue of this marriage one child only, namely, Irene Mackenzie, who was born in 1880.

By a deed dated October 3, 1882, and made between the said John Mackenzie and Louise his wife of the one part, and the then trustees of the deed of 1878 of the other part, Louise Mackenzie, in exercise of the power in that behalf given her by the deed of 1878, did thereby appoint that the trust premises should after her death "go, remain and be in trust" for such one or more of the issue of her said marriage "at such age or time or respective ages or times and if more than one in such shares and with such future or executory or other trusts for the benefit of the said issue or some or one of them and with such provisions for their respective maintenance education and advancement at the discretion of such person or persons and upon such conditions with such restrictions and in such manner as" she should by deed or will appoint, and in default of such appointment then in trust for the children of her said marriage at twenty-one or marriage in equal shares as tenants in common.

John Mackenzie died in 1898.

In 1907 Irene Mackenzie married one Ernest Huddleston, and had issue two children only. No settlement was made on the occasion of this marriage.

Louise Mackenzie made a will dated April 18, 1912, which was as follows: "I give devise and bequeath all my property of every description including any property over which I may have a power of appointment unto" F. H. Thornton and J. S. Huddleston "upon trust to sell and convert the same into money and to invest the residue of the proceeds of such sale and conversion after the payment thereout of my debts funeral and testamentary expenses in or upon such stock funds and securities as are authorised by law for the investment of trust funds," and to stand possessed of the trust premises upon trust to pay the annual income thereof to her daughter Irene Huddleston during her life for her absolute benefit, and after her death to stand possessed of the trust premises in trust for "the present and any future child or children" of her said daughter who should respectively attain the age of twenty-one years in equal shares, and the testatrix declared that after the death of her said daughter the said trustees might apply the annual income of the share or shares of any child or children of her said daughter in the said trust premises for or towards the maintenance and education or otherwise for the benefit of such child or children until they should respectively attain the age of twenty-one years. And the testatrix appointed the said F. H. Thornton, J. S. Huddleston, and her said daughter the executors of her said will.

Louise Mackenzie died in October, 1916, and her said will was proved by Irene Huddleston alone.

The trustees of the deeds of 1878 and 1882 issued a summons to determine (1.) whether the will of Louise Mackenzie operated as an exercise of the power of appointment vested in her by the deeds of 1878 and 1882; and (2.), if the power was exercised, whether they ought to transfer the trust funds the subject thereof to the trustees or executors of the said will, or whether they ought to retain the same and to continue to execute the trusts thereof; and (3.) that if necessary the trusts of the deeds might be executed by the Court.

Evidence had been filed showing that Louise Mackenzie at the date of her will and of her death had no power other than the above special power, and had no property other than personal estate and effects of about 80*l.* in value.

W. G. Hart, for the summons.

Stafford Crossman, for Mrs. Huddleston. Evidence as to the state or amount of the testatrix's property is not admissible for the purpose of ascertaining the presence or absence of an intention to execute the power: *In re Ackerley* (1); *In re Huddleston* (2); *In re Grainger* (3); Theobald on Wills, 7th ed. p. 127.

R. L. Ramsbotham, for the trustees of the will and the infant children of Mrs. Huddleston. The evidence is admissible as evidence of surrounding circumstances from which an intention to execute the power may be inferred: Theobald on Wills, 7th ed. pp. 107—108.

[NEVILLE J. I think the evidence is admissible as evidence of surrounding circumstances.]

Stafford Crossman. There are sufficient indications afforded by the will to show that the testatrix was intending to deal with her own property alone and not with that over which she had this power of appointment. In the first place, the gift is a devise and bequest of "my property" to her own trustees; secondly, she creates a trust for sale and conversion; thirdly, she provides a narrower

(1) [1913] 1 Ch. 510, 514.

(2) [1894] 3 Ch. 595.

(3) [1900] 2 Ch. 756, 768; on appeal [1902] A. C. 1, 9—10.

range of investments than that contained in the instrument creating the power; and, fourthly, she directs payment of her own funeral and testamentary expenses and debts. These circumstances taken together have a cumulative effect sufficient to show that she was not intending to deal with the property subject to the special power notwithstanding the general reference to property over which she might have a power of appointment: *In re Cotton* (1); *In re Weston's Settlement* (2); *In re Sanderson.* (3) The general requirements in order to show an intention to execute a special power are stated in *In re Ackerley* (4), and are not satisfied in the present case. The reference to any power of appointment is no stronger than the use of the word "appoint," which Buckley J. in *In re Weston's Settlement* (2) held to be insufficient as an indication of intention to execute a special power, declining to follow the decision of Farwell J. in *In re Mayhew.* (5) Lastly, the effect of an appointment to new trustees upon trust for the appointees is discussed in *In re Mackenzie* (6), *In re Adams' Trustees and Frost's Contract* (7), *Busk* v. *Aldam* (8), and *Scotney* v. *Lomer.* (9) In Farwell on Powers, 3rd ed. p. 372–3, it is stated that "it appears to be a question of construction whether the power authorizes a direction to transfer the fund to other trustees." In the present case it is submitted that in any case the trustees of the original settlement are the proper persons to continue to hold the trust funds.

R. L. Ramsbotham. The special power has been well exercised by the will of the testatrix. The fact that she had no other power than this special power and the express reference by her to any power of appointment and the word "appoint" are a sufficient indication of an intention to execute the power, and are at least as strong as the use of the word "appoint" alone, which was the foundation of the decision of Farwell J. in *In re Mayhew* (5), on which I rely. The direction to pay funeral and testamentary expenses and debts has been repeatedly held not to prevent a will from operating as an execution of a special power: *Ferrier* v. *Jay* (10);

(1) (1888) 40 Ch. D. 41.
(2) [1906] 2 Ch. 620.
(3) [1912] W. N. 54.
(4) [1913] 1 Ch. 510, 515.
(5) [1901] 1 Ch. 677.
(6) [1916] 1 Ch. 125.
(7) [1907] 1 Ch. 695.
(8) L. R. 19 Eq. 16.
(9) (1885) 29 Ch. D. 535.
(10) (1870) L. R. 10 Eq. 550.

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Cowx v. *Foster* (1); *Pidgely* v. *Pidgely* (2); and an appointment to trustees on trust to sell and divide the proceeds amongst the appointees has always been held to be substantially a good appointment: *Kenworthy* v. *Bate.* (3) In the next place, the words creating the power are of the widest possible character and justify an appointment to new trustees of the appointor's choosing, and also the restriction in the range of investments if the appointor thought the original investment clause too wide, and it is submitted that the trustees of the will are entitled to a transfer of the trust funds from the settlement trustees: Farwell on Powers, 3rd ed. pp. 373–4; Underhill on Trusts, 7th ed. pp. 425–7; *In re Redgate* (4); *In re Paget* (5); *In re Adams' Trustees and Frost's Contract.* (6) All the authorities are considered in the recent case of *In re Mackenzie.* (7)

NEVILLE J. The first point I have to decide is whether there was by the will of Mrs. Mackenzie an execution of a power which, under one of the deeds that constituted her marriage settlement, was given to her. The power is in the deed of October 3, 1882, and is undoubtedly expressed in very wide terms, and under it she had a power of appointment to her issue, but that was the only power of appointment she had. I have admitted evidence of the fact that at the date of her will and of her death she had little or no property except that which was comprised in the power of appointment. I think the evidence as to there being only one power is of very much greater assistance than the evidence as to the state of her property at the date of her death. It appears to me, in considering whether or not she intended to exercise the power of appointment given to her under the settlement, that surrounding circumstances, including the question of the state of her property, are admissible—that is to say, the evidence of these facts is admissible. But I may say I should have come precisely to the same conclusion as that to which I have come whether that evidence had been admitted or not. It appears to me that, apart from that evidence, there is in the facts that she is giving to the objects of the power and to them

(1) (1860) 1 J. & H. 30.
(2) (1844) 1 Coll. 255.
(3) (1802) 6 Ves. 793.
(4) [1903] 1 Ch. 356.
(5) [1898] 1 Ch. 290.
(6) [1907] 1 Ch. 695.
(7) [1916] 1 Ch. 125.

alone, and that she is expressly purporting to exercise any power of appointment when she had only this power of appointment to exercise, a sufficient indication of her intention to exercise the power, notwithstanding that she purports to provide for the payment of her debts. If she had any property at all, she may well have intended, as it has been held in other cases, that the debts should be paid out of her own property, because of course she could not charge the property over which she had the power of appointment with the payment of those debts. Having regard to the extreme difficulty in deciding whether a power of this kind does or does not justify the appointment to trustees, or whether the appointment must be direct to the children, I do not think it can be said that the appointment to her trustees is such an inconsistent provision in the will purporting to exercise the power as to show that the reference to any property over which she might have a power of appointment was not a reference to the property over which she had a power by virtue of the terms of her marriage settlement. I hold therefore that there was a good exercise of the power of appointment.

That being so, then comes the question whether the execution of the power operated to vest the trust property in the trustees of the will or to attach these new trusts to the trusts under which the trustees of the settlement hold the property. The difficulty, to my mind, is occasioned by the position of the authorities in similar cases; but I do not think it useful to go through them in detail. They have been repeatedly cited and considered, and I think I should not be acting wisely if I were to draw nice distinctions between the words used in this power and the words used in other powers of a similar character. I cannot honestly say that to my mind there is any material difference between the words used in the creation of this power and the words used in *Busk* v. *Aldam* (1), which is a subsisting authority, and has been followed in various cases dealing with equitable interests in personalty of a like nature to those in the present case. Therefore I think it is my duty to follow that case and to say that, although the power was well exercised, it did not have the effect of vesting in the trustees nominated in the appointment the trust

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(1) L. R. 19 Eq. 16.

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property, but that the trustees of the settlement are entitled to retain and hold it on the trusts declared by the will.

Solicitors for all parties: *Rider, Heaton & Co.*

H. L. F.

NEVILLE J.
1917
April 18, 19.

In re RAMSAY.

THORPE *v.* RAMSAY.

[1916 R. 1446.]

Will—Construction—Trust Legacy—Income for Maintenance of Wife and Children—Interest, from what Date payable.

A testator directed that the income of a trust legacy should so long as his wife remained his widow be paid to her until his children respectively attained the age of twenty-one years, or, being daughters or a daughter, married under that age, to be wholly applied by his wife for the maintenance of herself and the maintenance and education of his children, with a gift of three fifths of the corpus of the legacy to his children at twenty-one or marriage, and of the remaining two fifths of the corpus for his wife during widowhood, with reversion to his children.

Held, that the legacy carried interest from the death of the testator.

In re Crane [1908] 1 Ch. 379 distinguished.

The proposition in Jarman on Wills, 6th ed. vol. ii. p. 1114, that "where a testator bequeaths a legacy to an adult, subject to the obligation of maintaining the testator's children, or children towards whom he stands in loco parentis, it does not carry interest until after a year from the testator's death," is too broadly stated.

ADJOURNED SUMMONS.

Samuel Ramsay, by his will dated May 30, 1912, after appointing the plaintiff and the defendant William Ramsay his executors, whom he called his "general trustees," and after giving some pecuniary legacies, including a legacy of 200*l.* to his wife to be paid to her as soon as possible after his death, gave all his real and personal estate to his general trustees upon trust for sale and conversion and thereout to pay his funeral and testamentary expenses and debts and the before-mentioned legacies, and directed his general trustees to stand possessed of the residue of the said moneys, called his "residuary estate," upon trust, firstly, and as a first charge thereon to the exclusion of all other gifts whatsoever, whether absolute or in trust, thereinafter made, if such exclusion should be necessary by reason of the insufficiency of the said moneys to provide therefor, to pay to the Public Trustee the sum of 20,000*l.* to be held by him upon the trusts thereinafter declared, and which trusts were thereinafter referred to as his "family trust"; and, secondly, to pay certain pecuniary legacies thereinafter mentioned, including sums of 2000*l.* and 1000*l.*, to be paid to the Public Trustee as therein mentioned, provided that, if his residuary estate after providing for the first charge thereon of 20,000*l.* should be insufficient for the payment of the said legacies in full, then the said legacies were to abate rateably. And the testator directed his general trustees to pay over and transfer all the rest of his residuary estate to the Public Trustee as part of and by way of accretion to his family trust fund. And the testator directed the Public Trustee to invest the said sum of 20,000*l.*, and to stand possessed of the investments for the time being representing the same, thereinafter called his "family trust fund," upon trust "should my wife so long remain my widow to pay the income thereof to her until each of my children who shall survive me shall successively attain the age of twenty-one years or being a daughter or daughters shall marry under that age the said income to be wholly applied by my said wife for the maintenance of herself and the maintenance and education of my daughters Eva Ramsay and Alma Ramsay and my son Richard Ramsay and any other child or children of mine, and upon each child attaining the age of twenty-one years or if a daughter on her marrying under that age in trust to allocate and set apart an equal proportionate part or share (according to the number of my children then living) of three fifths of my family trust funds (which three fifths are hereinafter called 'the children's fund'), and shall stand possessed of such part or share if the child be a daughter upon the trusts hereinafter declared called 'the daughters' trusts' and if the child be a son in trust for him absolutely." And the testator declared that if only one of his children should attain the age of twenty-one years or if a daughter should marry under that age then the Public Trustee should stand possessed of the whole of "the children's fund" if the child should be a daughter upon "the daughters' trusts" and if a son in trust for him absolutely. And the testator directed that pending the attainment by his youngest child who should survive him of the age of twenty-one years or if a daughter her marriage under that age, the income of such part of his family trust funds (including the unallocated proportion of "the children's fund") as should for the time being remain in the hands of the Public Trustee (other than the shares held by him upon the daughters' trusts or other denominated trusts if any) should, provided his said wife should so long remain his widow, be paid to and applied by her for the maintenance of herself and the maintenance and education of his younger child or children whose interests thereunder should not have become vested, and from and after the attainment by his youngest child who should survive him of the age of twenty-one years, or if a daughter her marriage under that age, he directed the Public Trustee to stand possessed of the remaining two fifths of his family trust funds (thereinafter called his wife's fund) in trust to pay the income thereof to his said wife during her life if she so long remained his widow, and upon her death or remarriage upon the trusts therein declared in favour of his children and grandchildren. And the testator directed that, after the death or remarriage of his said wife, in the event of her remarrying or dying during the infancy of any child of his, the Public Trustee during such infancy should pay the income from such part of his family trust funds as should for the time being be in his hands (other than the share or shares held upon the daughters' trusts) to his said wife if living, or if dead to such guardian as she should have appointed, to be applied for and towards the maintenance and education of such infant child or children. Then followed gifts over of the children's fund and the wife's fund in the event of no child attaining an absolute vested interest therein. And the testator, after declaring trusts of his daughters' shares (which trusts were primarily in favour of such daughters and their children), directed the Public Trustee to stand possessed of the said sum of 2000*l.* in trust to pay the income thereof to the defendant William Ramsay for life, and after his death upon the trusts declared of his family trust funds and as an accretion thereto. And the testator directed the Public Trustee to stand possessed of the said sum of 1000*l.* upon trust to pay the income thereof to Naomi Cousins (known as Mrs. Crane) for life, and after her death upon the trusts declared of his family trust funds and as an accretion thereto.

The testator died in October, 1913, and his will, with a codicil (not material), was proved by the executors. The testator's wife survived him and had not married again. His children were the three named in his will, and all of them were infants. The daughters were unmarried.

The testator's debts, testamentary and funeral expenses had been paid, and his estate, which was valued at about 28,000*l.*, was believed to be sufficient to pay all the legacies in full. The legacy of 200*l.* was paid to his wife shortly after his death.

In March, 1914, and subsequently the executors transferred and paid securities and cash to the Public Trustee in full satisfaction of the trust legacy of 20,000*l.* Prior to such transfer and payment the executors out of the income received by them from the testator's estate paid to his widow on account of income or interest of the trust legacy of 20,000*l.* two sums of 300*l.* and 100*l.* The executors paid these two sums in the belief that that trust legacy carried interest from the testator's death, particularly in view of the fact that under the terms of the will the maintenance and education of the testator's infant children had to be provided for out of the income of that trust legacy, as no other fund was provided by him for that purpose. The question having arisen, amongst others, whether the payment of these two sums was proper, the plaintiff issued a summons to determine (inter alia) whether upon the true construction of the said will the trust legacy of 20,000*l.* carried interest at 4 per cent. per annum from the date of the testator's death or from the expiration of one year thereafter.

W. G. Hart, for the plaintiff.

Rowland Rowlands, for the testator's widow. It is submitted that the family trust fund carries interest from the death of the testator. First, the legacy is in substance a gift of the residue. It is a first charge on the residue and the Ramsay trust fund and the Crane trust fund, and any residue after payment of the other legacies are to fall into it by way of accretion to it, and there is the direction that if the estate is insufficient all the legacies except this 20,000*l.* legacy are to abate rateably. Secondly, where a legacy is given to an infant by a father or by a person in loco parentis to the infant, the rule is to allow interest on the legacy from the death of the testator for the maintenance of the infant. It seems that a clear gift of income to an adult subject to the obligation of maintaining infants does not carry interest from the death of the testator, but it is submitted that if the primary object of a testator in loco parentis is for the benefit and maintenance of the infants then interest runs from his death. *In re Crane* (1) will be cited against me, but it is distinguishable. There the testator's daughter-in-law was the primary object of his bounty, and there was an absolute gift of the whole income to her subject to the condition of maintaining her children. Here there is not an absolute gift of the income to the wife, but she is to apply the whole of it for the maintenance of herself and the maintenance and education of the children. She shares in the benefit, but the object of the testator is to provide for his children, and it is a trust for their maintenance and comes within the rule: *In re Booth* (2); *In re Richards* (3); *Beckford* v. *Tobin.* (4)

Vaisey, for the defendants Ramsay and Mrs. Crane, did not oppose.

Howard Wright, for the Public Trustee, representing the parties interested under the ultimate gifts over. There is an important distinction between the case where a legacy is given direct to or in trust for a child by a person in loco parentis and the case where the legacy is given to an adult with the obligation of maintaining the child. Where the legacy is given direct to the child the Court, if the child has no other provision, allows interest by way of maintenance from the death of the testator: *Heath* v. *Perry* (5); *Incledon* v. *Northcote* (6); *Hearle* v. *Greenbank.* (7) But where the legacy is given to an adult subject to the condition of maintaining the child, the rule does not apply: *Hammond* v. *Neame* (8); *Raven* v. *Waite* (9); *In re Crane.* (1) In Jarman on Wills, 6th ed. vol. ii. p. 1114, the principle is said to be that "where a testator bequeaths a legacy to an adult, subject to the obligation of maintaining the testator's children, or children towards whom he stands in loco parentis, it does not carry interest until after a year from the testator's death." Here the claim is by an adult who is entitled to the income of the legacy subject to the obligation of maintaining the testator's children, and the principle of *In re Crane* (1) applies.

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(1) [1908] 1 Ch. 379.

(2) [1894] 2 Ch. 282.

(3) (1869) L. R. 8 Eq. 119.

(4) (1749) 1 Ves. Sen. 308.

(5) (1744) 3 Atk. 101.

(6) (1746) 3 Atk. 430, 438.

(7) (1749) 3 Atk. 695.

(8) (1818) 1 Swans. 35.

(9) (1818) 1 Swans. 553.

NEVILLE J. In the will before me the testator, who left a widow and infant children, has adopted a singular method of dealing with his estate. It appears to me that he intends the whole of his estate to be for the benefit of his wife and children subject to the payment of some minor legacies mentioned in the will, but he prefers to create a series of trust funds. First he creates a family trust fund of 20,000*l.*, which is the main trust fund and is made a first charge on his residue, and he directs that sum to be paid by his executors to the Public Trustee to be held by him upon the following trusts. [His Lordship read the trusts of the family trust fund, and proceeded :] The direction is that the income of that fund is to be paid to his wife so long as she remains his widow to be wholly applied by her for the maintenance of herself and the maintenance and education of his children during their infancy. He obviously contemplated that they would live together. Then he allocates three fifths of the corpus of the family trust fund for payment to his children at twenty-one or marriage, and then he deals with the other two fifths of the fund for the benefit of his wife during widowhood, with remainder to his children. By a subsequent provision in the will any residue after providing for the other trust legacies is to go in augmentation of the family trust fund, and, unless he thought that fund would provide an income for the maintenance of his wife and children, there is no very obvious reason for dealing with his estate in this way. There is a moral obligation on a father to provide for his infant children, and he does not do that if he makes no provision for them for a year after his death. Here I think it is clear that the primary intention of the testator was to provide a family fund the income of which should maintain his wife and children, but if the income of that fund is not to be payable until one year after his death that object would be defeated, because it would not be an income-bearing fund, and his intention to provide for their maintenance during the first year after his death would

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(1) [1908] 1 Ch. 379.

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RAMSAY, *In re.* THORPE *v.* RAMSAY.

entirely fail, and they would be without means of subsistence. I cannot think the testator intended such a result. The authorities show that where a legacy is given by a father to a child, or by a testator who stands in loco parentis to a child, who is an infant, interest is allowed on the legacy from the death of the testator by way of maintenance for the infant. It is said that *In re Crane* (1) governs this case, but I think it is distinguishable. There a testator bequeathed the income of a trust legacy to his daughter-in-law during her widowhood, subject to the obligation of maintaining her deceased husband's children while minors and unmarried, and it was held that the legacy did not carry interest from the testator's death. But the circumstances of that case were not the same as in this case. There the daughter-in-law was the primary object of the testator's bounty. But that is not the case here. In my opinion the testator's widow is not the primary object of his bounty, but his primary object and intention is to create a fund the income of which will provide for the maintenance of his widow and infant children. Here the income is not given simply to the wife subject to the obligation of maintaining the children, but it is to be wholly devoted and applied by her in the maintenance of herself and the maintenance and education of his infant children. It would be an unfortunate limitation of the rule laid down in the cases as to the maintenance of infant legatees, if in a case like this I am bound by authority to defeat the evident intention of the testator. But I do not think that I am precluded by the decision in *In re Crane* (1) from giving effect to the intentions of this testator, because the legacy there was given with a different intention to that in this case; and I also think that the proposition cited to me from Jarman on Wills, with regard to a legacy to an adult subject to the obligation to maintain infants, is too broadly stated. I hold, therefore, that in this case the trust legacy of 20,000*l.* carries interest at the rate of 4 per cent. from the death of the testator.

Solicitors: *Collyer-Bristow, Curtis & Co., for Stone, Simpson & Mason, Tunbridge Wells; Rossiter & Odell, for Tinley Barton, Bournemouth; Farrer & Co.*

H. L. F.

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(1) [1908] 1 Ch. 379.

MOODY *v.* COX AND HATT.

[1915 M. 1893.]

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Solicitor—Trustee—Contract for Sale of Trust Property—Solicitor acting for Vendor and Purchaser—Fiduciary Relationship—Conflicting Duty—Non-disclosure to Purchaser of Knowledge as to Value—Bribe given by Purchaser to Vendor's Agent—Waiver by Vendor of Right to repudiate Contract—Right of Purchaser to rescind.

The plaintiff contracted to purchase from H. and C., who were trustees, a portion of their trust property. H. was a solicitor and C. was his managing clerk. Throughout the transaction H. acted (through C.) as solicitor both for vendors and purchaser. C. failed to disclose to the plaintiff certain valuations previously obtained showing that the property was not worth the price which the plaintiff agreed to pay. The plaintiff knew that the vendors were trustees. In the course of the negotiations the plaintiff offered and C. accepted a bribe. In an action by the plaintiff for rescission of the contract the defendants counterclaimed for specific performance:—

Held, affirming the decision of Younger J., that H., as the plaintiff's solicitor, was bound to disclose to him all material facts relating to the matter, and that he was not relieved of that obligation by the fact that he owed a conflicting duty to his cestuis que trust. By the claim for specific performance the contract, which might have been repudiated on the ground of the bribe, was affirmed, and the plaintiff was not therefore deprived of his equitable right to rescission on the independent ground of the non-disclosure by his solicitor of material facts.

APPEAL from a decision of Younger J.

The action was brought by the plaintiff to set aside a contract entered into by him on April 17, 1915, for the purchase from the defendants of a public-house known as the Marquis of Granby, together with a piece of land and four cottages adjoining, at Reading. The defendants counterclaimed for specific performance of the agreement. The property in question formed part of the estate of one W. H. Lee, who died in the year 1910, and of whose will the defendants were executors and trustees. At the date of the agreement the public-house was on lease to Messrs. Wethered, a firm of brewers. The defendant Hatt was a solicitor practising at Reading and Oxford, and the defendant Cox was his managing clerk. He carried on Hatt's Reading business, but was not himself an admitted solicitor.

In 1915 the plaintiff, being minded to acquire a site for the erection of a cinema theatre, negotiated through Cox with the defendants and their tenants Messrs. Wethered & Sons for a lease of a piece of land adjoining the Marquis of Granby, and on February 1, 1915, he entered into an agreement with the defendants and the brewers for a lease of the proposed site, upon which he covenanted to erect the theatre. On February 6 the plaintiff saw the defendant Cox upon a proposition of his to buy outright from the defendants the fee simple of the site agreed to be leased by the agreement of February 1, together with two of the cottages adjoining. On that day he signed an offer, prepared by Cox, to purchase these at 1980*l.*, and on February 8, by a formal agreement in writing of that date, also prepared by Cox, he agreed with the defendants to purchase from them for the sum of 2000*l.* the fee simple of the site and also the cottages, and he then, by cheque in favour of Hatt, paid a deposit of 200*l.* in respect of that purchase. He then determined to acquire the two remaining cottages, and on April 17 he went to Hatt's office to negotiate for the purchase of them. On this occasion Cox suggested that the plaintiff should buy the whole of the property originally included in the brewers' lease, together with the cottages, and after considerable discussion a sum of 8400*l.* was arrived at as the price of the whole. The plaintiff having already paid 200*l.* by way of deposit on the second contract gave Cox a cheque in favour of Hatt for 1800*l.*, making 2000*l.* in all, in respect of the purchase-money, the bargain being that the sum of 6400*l.* should be left on mortgage. The following agreement was then drawn up by Cox and signed by the plaintiff: "To Frederick Empson Moody of Hamilton Road, Reading. It is hereby acknowledged that you have to-day agreed to purchase the whole of the freehold premises known as 'The Marquis of Granby,' London Road, Reading, together with the yard, stable and buildings thereto belonging and also the four cottages known as Nos. 2, 4, 6, and 8, Granby Gardens, Reading, aforesaid for the sum of 8400*l.* and that you have this day paid the sum of 1800*l.* making together with the sum of 200*l.* already paid as a deposit the sum of 2000*l.* It is understood that you will be entitled to the benefit of the rents of the property as from to-day subject to all outgoings being apportioned: A good and proper conveyance of the property to be executed to you within one month: A mortgage of 6400*l.* to be arranged on your behalf at the rate of 5*l.* per centum per annum, such mortgage to contain the usual covenants and to be completed within the same time: The interest to run from to-day. It is further understood that you take the property subject to lease granted to Messrs. T. Wethered & Sons of which you have full knowledge and also to the agreement already executed between yourself, Messrs. T. Wethered & Sons and Messrs. Hatt and Cox but you of course to be entitled to the benefits thereof and be in a position to exercise from date the rights of ownership over the property. It is further understood that you have paid all your costs up to date and that you are only responsible for the costs of negotiating and carrying out the sale to yourself at 8400*l.* and arranging the mortgage and all out of pockets. Dated this 17th day of April, 1915. Agreed. F. E. Moody." It was to set aside that agreement that this action was brought.

The plaintiff contended that at the time when it was negotiated with Cox and signed by him Cox was, as Hatt's representative, acting as his solicitor; that the agreement was disadvantageous to him; that facts within Cox's knowledge in relation to the property and its nature, which ought to have been disclosed to the plaintiff as his client, were in fact withheld, and that statements in fact false were made by Cox to induce him to enter into the contract; and that on these statements he relied. On the other hand, it was said by the defendants that the relation between the plaintiff and Cox and Hatt, so far as any negotiation of price was concerned, was that of purchaser and vendor only; that the plaintiff throughout acted on his own knowledge of the property and on his own initiative, and neither asked for nor relied upon any advice given by the defendants and placed no confidence in them; that there was no obligation on the part of the defendants to make to the plaintiff disclosure of any facts beyond those already known to him in relation to the property; and that no statements in fact false were made to him.

It was not disputed that for some purposes at least Hatt had acted as the plaintiff's solicitor in connection with the above transactions, and Younger J., upon the evidence, came to the conclusion that he acted in that capacity in connection with the agreement of April 17.

In 1910, when the testator died, the Marquis of Granby, then demised to Messrs. Wethered & Sons, was in the first instance valued for probate at 4210*l.* This valuation was, however, not accepted by the Inland Revenue authorities, and ultimately 6600*l.* was agreed to be its value as at that date. The cottages on the same occasion were valued at 178*l.* a house. Cox had also in his possession on April 17, 1915, another test of the value of the cottages and of the land. On February 15 the defendants, for the satisfaction of their mortgagees, had obtained a valuation of the property included in the second agreement, with the result that the property for which under the contract the plaintiff had agreed to pay 2000*l.* was valued, the land at 546*l.* and the cottages at 320*l.*—that is, 160*l.* a cottage and 866*l.* in all. The lease of the Marquis of Granby, granted by the testator on April 6, 1909, was for a term of twenty-one years determinable by the lessees at the expiration of seven and fourteen years at an annual rent of 300*l.* For this lease a premium of 3000*l.* was paid.

Under the decision of the King's Bench Division in the case of *Watney, Coombe, Reid & Co.* v. *Berners* (1) the brewers were entitled to deduct 61*l.* 2*s.* 2*d.* from the rent in respect of compensation levy. On appeal to the Court of Appeal that decision was reversed (2) and the 61*l.* 2*s.* 2*d.* was paid to the defendants. At the date of the transactions with the plaintiff, however, the case was under appeal to the House of Lords, and the full rent was only being paid to the defendants on their written undertaking to repay it to the brewers in the event of that appeal being successful. The appeal did ultimately succeed, and the effect of the final decision was to reduce the annual rent of the Marquis of Granby by 61*l.* 2*s.* 2*d.* for the remainder of the lease. (3) The price demanded and ultimately obtained by Cox for the Marquis of Granby on April 17 was 7500*l.*, and for the cottages 900*l.*, or 225*l.* each.

With reference to the negotiations as to price between the plaintiff and himself Cox in his evidence said: "I was insisting on 225*l.* for the cottages. I did not then consider the plaintiff required them. I did say the cottages were worth 225*l.* I knew that they were not worth it, because I had been advised that they were worth a great deal less. I knew the value of the Marquis of Granby had depreciated since the probate valuation. I did not tell him the amount of the probate valuation. I told him we were insisting upon 7500*l.* because the property was worth it." Cox also failed to disclose to the plaintiff the possibility of the rent of 300*l.* receivable for the Marquis of Granby being reduced to the extent of 61*l.* in the event of the compensation levy being thrown upon the lessor.

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(1) [1913] 3 K. B. 427.
(2) [1914] 3 K. B. 288.
(3) [1915] A. C. 885.

On the occasion of the second agreement the plaintiff gave to Cox a cheque for 100*l.*, which he called an emolument; and on the occasion of the third agreement another emolument of the same amount paid in the same way, and all in addition to making the payments for the properties above detailed.

Younger J. held that the plaintiff was entitled to succeed on the ground that Hatt had failed to fulfil his obligation, as solicitor for the plaintiff, to disclose to him all material facts in his knowledge relating to the matter. As to the giving of the bribes, the defendant Hatt, by affirming the contract, which he might have repudiated, had removed the blot upon it, and placed the parties in the position in which they would have been if no bribes had been given. The plaintiff was not, therefore, deprived of his equitable right to rescission.

The defendants appealed.

Hohler, K.C., *Mathew, K.C.*, *Archer*, and *Copping* (for *C. A. Bennett*, serving with His Majesty's Forces), for the appellants. Younger J. was wrong in holding that there was any fiduciary relation between the plaintiff and the defendants. The defendant Hatt was only acting as solicitor for the plaintiff in the matter of the conveyance. The plaintiff was acting entirely on his own account in negotiating the third agreement and fixing the price of the property. He did not rely upon the advice of Cox in that matter, and the defendants owed him no duty: *Edwards* v. *Williams.* (1) *Holman* v. *Loynes* (2) and *Fox* v. *Mackreth* (3) show that a solicitor who mixes himself with the character of vendor assumes a very heavy responsibility, but those cases do not apply here. The real inference from the evidence is that no confidence was reposed in the defendants nor relied upon by the plaintiff. The plaintiff knew that the defendants were trustees, and he could not, therefore, rely upon the duty of the defendants to advise and protect him. The fact that he gave a bribe to Cox disposes entirely of the question of confidence. There was no obligation upon Cox to disclose the valuation of 1910, which

(1) (1863) 32 L. J. (Ch.) 763. (2) (1854) 4 D. M. & G. 270.
(3) (1788) 2 Bro. C. C. 400.

was obtained for an entirely different purpose. The facts in *Holman* v. *Loynes* (1) were altogether different.

[SCRUTTON L.J. Where the inference is that the solicitor has influence over the client, the solicitor must show that the transaction is absolutely fair. "There must be uberrima fides between the attorney and the client, and no conflict of duty and interest can be allowed to exist": *McPherson* v. *Watt.* (2)]

There is no evidence here of the confidence which gives rise to the obligation to disclose. The fact of having given a bribe to Cox destroys the right of the plaintiff to ask for equitable relief by way of rescission: *Shipway* v. *Broadwood.* (3)

[WARRINGTON L.J. Why cannot he rescind if the defendants have elected to hold him bound by the agreement?]

He who comes into equity must come with clean hands.

[SCRUTTON L.J. referred to *Hughes* v. *Liverpool Victoria Legal Friendly Society.* (4)]

There the contract was illegal. There is nothing illegal in this contract. It may be that the defendants cannot get specific performance, but the plaintiff cannot obtain any relief in respect of the contract: *Hovenden* v. *Millhoff.* (5) The necessity for disclosure does not arise if in fact the purchaser never expected or relied upon the solicitor to advise him as to the value of the property. When the purchaser knows that the solicitor is acting for trustees that is entirely different from a case where the solicitor is selling his own property to his client: *Pisani* v. *Attorney-General for Gibraltar.* (6) The obligation to disclose is founded upon the influence of the solicitor over his client. If that element is removed, then the doctrine falls to the ground. When it is clear that the solicitor and client are at arm's length, then all question of confidence is gone: *McPherson* v. *Watt.* (2) There is a distinction between duty and duty and duty and interest: *Gibson* v. *Jeyes* (7); *Montesquieu* v. *Sandys* (8); *Edwards* v. *Meyrick.* (9) Here the surrounding circumstances are such that the client could not expect to rely upon any confidence reposed by him in the solicitor: Kerr on Fraud and Mistake, 4th ed., p. 167.

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(1) 4 D. M. & G. 270.
(2) (1877) 3 App. Cas. 254, 266.
(3) [1899] 1 Q. B. 369.
(4) [1916] 2 K. B. 482.
(5) (1900) 83 L. T. 41.
(6) (1874) L. R. 5 P. C. 516.
(7) (1601) 6 Ves. 266.
(8) (1811) 18 Ves. 302.
(9) (1842) 2 Hare, 60, 68.

[LORD COZENS-HARDY referred to *Huguenin* v. *Baseley*. (1)]

In *Hesse* v. *Briant* (2) there was clearly a necessity for the utmost openness of dealing, but here the plaintiff knew that the defendants as trustees were bound to get the best price that they could: *Transvaal Lands Co.* v. *New Belgium (Transvaal) Land and Development Co.* (3) is no authority here.

The fact of having given a bribe estops the plaintiff from objecting to the price as excessive. The Court will presume from the bribe that the purchaser was getting an advantage: *Hovenden* v. *Millhoff*. (4) It is true that the defendants have affirmed the contract, and that all the legal rights under it are unaffected, but no equitable rights in respect of it can be asserted by the plaintiff: *Cox* v. *Middleton*. (5) Equity will not assist any one who does not do equity himself. The right of the defendants to repudiate arising from the giving of the bribe having been waived, the plaintiff has open to him any legal ground for avoidance such as actual fraud on the part of Cox. But he can never obtain equitable relief such as rescission on the ground of unfairness. The distinction is one of substance depending on the fact that the giving of equitable relief is discretionary, but legal relief is not. If Cox had been guilty of legal fraud, the plaintiff would have had a legal right to rescind, to which the Court would be bound to give effect when once Hatt had waived the right to repudiate. But Moody can only invoke a right to rescission which is equitable, i.e., one in respect of which the Court has a discretion to withhold relief. Nothing but clean hands and reasonable diligence can call forth a Court of Equity into activity. The contract stands at law. The Court will leave the parties to their legal rights, and will give neither the equitable relief of rescission to the plaintiff nor the equitable relief of specific performance to the defendants.

H. Terrell, K.C., and *Harman*, for the respondent. If a material representation which is untrue be made it is not necessary for the person to whom it is made to prove that he relied upon it: *Redgrave* v. *Hurd*. (6)

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(1) (1807) 14 Ves. 273.

(2) (1856) 6 D. M. & G. 623.

(3) [1914] 2 Ch. 488, 503.

(4) 83 L. T. 41.

(5) (1854) 2 Drew. 209.

(6) (1881) 20 Ch. D. 1, 24.

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[SCRUTTON L.J. referred to *Aaron's Reefs, Ld.* v. *Twiss.* (1)]

As to the relation of solicitor and client, the authorities are based upon the principle of undue influence. In transactions of this nature the burden of proof is upon the solicitor to show that the client was duly informed and advised and that the bargain was fair. If the fiduciary relation exists the Court assumes the influence and there must be full disclosure. It is said in this case that there was no necessity for disclosure by reason of the knowledge of the plaintiff as to the defendants' position. But if a man takes upon himself a double duty he must be bound by the consequences. The fullest disclosure was necessary in this case : *Tate* v. *Williamson.* (2) This is an even stronger case. The defendants were in possession of a valuation showing that the property was worth far less than the plaintiff was contracting to give for it. When once the fiduciary relation is established it continues until it is shown to have been determined : *Rhodes* v. *Bate.* (3) Here there was nothing from which it could be assumed that the confidential relation between the parties was determined.

As to the bribe, offered and taken, that has nothing to do with the case. Cox ought in his capacity of solicitor to have advised the plaintiff against it. It was not given by the plaintiff to induce Cox to do anything wrong, the object being that Cox should arrange a permanent mortgage at a low rate of interest. It was not given to induce a sale at an insufficient price.

[LORD COZENS-HARDY M.R. It is said that the giving of the bribe debars the plaintiff from any right to equitable relief.

SCRUTTON L.J. referred to the following passage from the judgment of Eyre C.B. in *Dering* v. *Earl of Winchelsea* (4) : " It is not laying down any principle to say that his ill conduct disables him from having any relief in this Court. If this can be founded on any principle, it must be, that a man must come into a Court of Equity with clean hands : but when this is said, it does not mean a general depravity ; it must have an immediate and necessary relation to the equity sued for ; it must be a depravity in a legal as well as in a moral sense."]

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(1) [1896] A. C. 273.

(2) (1866) L. R. 2 Ch. 55.

(3) (1865) L. R. 1 Ch. 252, 260.

(4) (1787) 1 Cox, 318 ; 2 Wh. & T. L. C. 8th ed. 539.

If the plaintiff were asking for specific performance, no doubt he could get no relief. But he has been deceived and is entitled to rescission. Here the pre-existing relationship between the parties involved the duty of entire disclosure: *Davies* v. *London and Provincial Marine Insurance Co.* (1) It is for Hatt to show that through Cox he made the fullest disclosure. His conflicting duty to his cestuis que trust is no answer to his failure of duty towards the plaintiff: *Taylor* v. *Blacklow.* (2)

Hohler, K.C., in reply.

LORD COZENS-HARDY M.R. This case at first sight struck me as one of great difficulty and considerable nicety, but, having listened to the very full and able arguments of counsel, I do not think there is any real reason why we should delay giving judgment merely for the sake of putting it in a considered form. [The Master of the Rolls then stated the facts, and came to the conclusion that the defendant Hatt, through Cox his managing clerk, acted at all material times as solicitor for Moody. His Lordship then proceeded :]

Now what is the duty of a solicitor standing in this fiduciary position towards his client ? If he, the solicitor, desires to buy or sell the property—I care not which way it is—the obligations would be just the same in their nature whether it were a sale to the client or a sale to the solicitor. I know of no better authority to settle the principles applicable to the case than Lord Eldon's judgment in *Gibson* v. *Jeyes* (3), where he says this : "If he" (the solicitor) "will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person." There is another passage (4): "But, from the general danger the Court must hold, that if the attorney does mix himself with the character of vendor he must shew to demonstration, for that must not be left in doubt, that no industry he was bound to exert would have got a better bargain."

The relief in a case of this kind does not depend upon undue influence. That is not the ground on which I base my judgment. There may be cases in which undue influence is proved as a fact, but

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(1) (1878) 8 Ch. D. 469, 474.
(2) (1836) 3 Bing. N. C. 235.
(3) 6 Ves. 266, 278.
(4) Ibid. 271.

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the principle to decide this case upon, in my view, is this: An attorney selling to a client or buying from a client is bound to disclose everything that is material, or may be material, to the judgment of his client before the transaction is completed. The duty to disclose is quite consistent with the absence of undue influence, and that is all that seems to me to be involved here. Counsel for the defendants say that the solicitor here had not any undue influence over his client, who was an independent man of business and who would not have looked to him for advice on the propriety of this transaction, and therefore there is no liability. The answer is, I think, that the liability does not depend upon undue influence. I adopt the judgment of Fry J. in *Davies* v. *London and Provincial Marine Insurance Co.* (1): "If there be a pre-existing relationship between the parties, such as that of . . . . solicitor and client . . . . , then, if the parties can contract at all, they can only contract after the most ample disclosure of everything by the . . . . solicitor" to the client. That being the principle, it is quite apparent to my mind that that disclosure never was made. The third contract brought in some more cottages, and included more property than the previous contracts. As to that fresh property which was brought in, as well as to the Marquis of Granby, which had been brought in before, there was no disclosure of the fact that valuations had been made and obtained by the vendors, showing that the value of this property was in the opinion of the valuer much less than the plaintiff was contracting to give for it. Those valuations were not disclosed until the trial, and it seems to me to be exactly and precisely the case in which the solicitor cannot uphold the transaction without showing that he has given full disclosure of every fact which could be material. But I do not like to leave it there. Cox's own evidence is that he told the plaintiff at the interview on April 17 that the cottages were worth the figure mentioned in the contract, and he said in the box that he knew that the cottages were not worth the figure which he stated they were. That being what I can call nothing else but a lie uttered to the purchaser, as it was on the very day when this contract was entered into, it seems to me to be quite hopeless to contend that there was a disclosure of that which, having regard to the relationship between the parties, was bound to be disclosed. There was an earlier

(1) 8 Ch. D. 469, 474.

valuation taken for the purposes of probate, and probate valuations, one knows as a matter of common knowledge, are not apt to be too high; they generally are too low. But Cox knew, he said, that the property was not of the value even of the probate valuation. In these circumstances, unless a difference is established on the ground which I will now mention, it seems to me that the defendants' case is really almost unarguable. But it is said that this is not a case to which the doctrine of *Gibson* v. *Jeyes* (1), or *Holman* v. *Loynes* (2), or any of those cases ought to be applied, because the solicitors here were not dealing with their own property; and it is not a case in which their interest conflicted with their duty, because they owed a duty to their beneficiaries. Their duty to the beneficiaries was to get as much as they could for the property. Their duty to the purchaser, who knew that they were selling as trustees, could not, it is said, involve any obligation to disclose to him the valuations which they had obtained in their character of trustees for the beneficiaries. I think that is quite a mistaken view of the matter. A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other; but if he chooses to put himself in that position it does not lie in his mouth to say to the client "I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side." The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say—which would be much better—"I cannot accept this business." I think it would be the worst thing to say that a solicitor can escape from the obligations, imposed upon him as solicitor, of disclosure if he can prove that it is not a case of duty on one side and of interest on the other, but a case of duty on both sides and therefore impossible to perform. I do not desire to draw any distinction between the simple case where he has one client who is selling his own property

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(1) 6 Ves. 266.

(2) 4 D. M. & G. 270.

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to him and a case like the present, where he has a client and as trustee is selling to that client. I think, therefore, on this ground the argument of the appellants cannot prevail.

There is only one other matter to which I need refer. It is a painful aspect of this case. Cox, one of the defendants, who was managing clerk for Hatt, and who, I am surprised to hear, is still in that position, accepted from the plaintiff two bribes of 100*l.* each. His counsel admits that they were bribes. It cannot be disputed that Cox is accountable for those bribes to the beneficiaries of whose estate he was trustee. What was the consequence of those bribes ? The vendors, the beneficiaries, might have declined to stand by the contract, and might have said "This contract was obtained by reason of bribes which you, Moody, gave to one of the trustees, and that vitiates the whole transaction." But they are not bound to say that. They may say "The contract which is obtained by reason of this bribe is such an advantageous contract for us that we will waive that. We do not object to it." But then it is said, that being so, the plaintiff, who gave the bribe, cannot obtain any equitable relief in respect of this contract, and in equitable relief is included rescission of the contract. Well, I ask myself what principle is there which can compel the Court to say "We will not rescind the contract which has been obtained quite apart from the objection of bribes, which objection has been waived by the other party, who does not desire to raise it" ? It strikes me as little short of shocking that we should be in that position. The beneficiaries do not repudiate the contract; they hold a considerable deposit in respect of this property, and they seriously suggest that, even assuming that the plaintiff has a good right to rescind the contract on the ground of non-disclosure, or would have but for the bribe, we ought to allow this deposit to remain in the pockets of the trustees and refuse to give any relief to the plaintiff in respect of it. The relief which is sought for in no way depends upon the bribe ; it is something quite independent of it, and it is in a certain sense irrelevant to consider it in this connection.

For these reasons, without attempting to consider the numerous authorities to which our attention has been called, I hold, both upon the facts and upon the law, that the decision of the learned judge was perfectly right, and this appeal must be dismissed with costs.

Warrington L.J. I am of the same opinion. The action is brought by the plaintiff for the purpose of obtaining a declaration that a certain agreement of April 17, 1915, for the purchase by him from the defendants, Hatt and Cox, of certain freehold property at Reading is not binding on the plaintiff, and to have that agreement rescinded and the deposit paid under it returned. The learned judge has determined the questions involved in favour of the plaintiff, and has ordered the contract to be rescinded upon the ground that the defendant Hatt, for whom Cox was acting as managing clerk, was at the time the agreement was entered into the solicitor for the plaintiff, and being in that position was under an obligation to disclose all material facts in his knowledge relating to the matters in question, and that he failed to make that disclosure and so failed to do his duty to the plaintiff.

With regard to the law, I think that there can be no doubt that if, as Lord Eldon said in *Gibson* v. *Jeyes* (1), a vendor will mix himself up or mix up his character of vendor with that of solicitor to the purchaser, he must be bound to do towards the purchaser what he would have done towards any other client, and use as much diligence and as much care and be under the same obligation as to disclosure as he would have been towards any other client. In fact there exists, owing to the position of the solicitor towards his client, a fiduciary relationship which imposes upon him the obligation not only of observing the utmost good faith in dealing with his client, but of giving to the client such advice and such information as he would have given if he had not been personally, in his other capacity, interested in the matters arising between them. [The Lord Justice then stated the facts and continued :]

On these facts I come to the conclusion that at the time this contract was made the relationship of solicitor and client subsisted as between Moody and Hatt, and that as a matter of law there was an obligation upon Hatt to disclose to Moody all material facts in his knowledge. Did he perform that duty ? Unquestionably not. Cox said in his evidence with regard to the cottages, " I said the cottages were worth 225*l.* each ; I knew they were not worth it, because I had been advised that they were worth a great deal less " ; and with regard to the Marquis of Granby he said that he did not disclose a probate valuation, which it is hardly necessary to say was much less than the price to be given by Moody; that he knew since the valuation had been made that the property had much depreciated in value, and yet he told him that the defendants were insisting on 7500*l.* because the property was worth it. He had in his possession at that moment a probate valuation of the Marquis of Granby, and he had in his possession another valuation with regard to the cottages which showed that those cottages were worth far less than the 225*l.* which he asserted they were worth in his negotiations with the plaintiff, and that valuation had only been made on February 15. But the matter does not rest there. There was a certain sum of 61*l.* which I think was the contribution to the fund for compensating brewers and publicans for houses shut up by the justices, and there was a question whether that sum was payable by the brewers or by the freeholders. It had been decided, I think, in the Court of Appeal that it was payable by the brewers. Accordingly Messrs. Wethered's rent had been paid in full, but an appeal from that decision was pending in the House of Lords, and Cox knew that unless it should result in confirming the decision of the Court of Appeal the rent would be reduced by the 61*l.* Notwithstanding that, he led Moody to remain under the impression that the full rent payable in respect of this house would be 300*l.*, and in fact on his own showing the purchase price eventually agreed to be given by Moody was calculated on that footing. Under these circumstances, how can it possibly be said that he, the solicitor acting for Moody, had made that disclosure of material facts which it was necessary for him to make, or that he had given to Moody such benefit as he would have had if he had been advised by a solicitor knowing these facts which were known to Hatt? The case seems to me to be so far unarguable.

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(1) 6 Ves. 266.

But it is said that under the facts of this particular case Hatt is not under the obligation which would be imposed upon him in an ordinary case, because it is said that Moody knew that Hatt was trustee for other persons; that he knew, therefore, that he had a duty to perform to those other persons, which I suppose was to obtain the best price that could reasonably be obtained; and that he knew, therefore, that he would not disclose anything material which he knew if it might be disadvantageous to his beneficiaries. In my opinion that is wholly irrelevant. It affords no answer at all. I will assume that he knew that it was Hatt's duty to do the best he could for his cestuis que trust. Of course he would, but he did not know that there were any facts the disclosure of which would reduce, or tend to reduce, the purchase price to be required. How could he possibly know that he was not to expect that Hatt would do his duty to him? It seems to me that Hatt has placed himself in a position in which he might possibly have been open to attack by his cestuis que trust if he had done his duty to Moody, but that is no answer to Moody, who says, "You have not done your duty to me."

I will say but few words with regard to the two bribes. On February 8, on the occasion of the 2000*l.* contract, and on April 17, on the occasion of the larger contract, Moody paid Cox the sum of 100*l.*; what for it is somewhat difficult to see. It has been called an "emolument," but I think it is more properly called a bribe. It was, I suppose, really to grease the wheels and induce Cox to get the matter through with ease and expedition. With regard to the second of the two transactions, it seems to have had some connection with the obtaining of a mortgage for the unpaid part of the purchase-money. But whatever it was it was a bribe. The result of that was this: that Moody could not have insisted on the performance of that contract because it would have been obtained by an improper payment made to the trustees, who were acting on behalf of the cestuis que trust. He might also have had to account for this money and to pay it over again to the cestuis que trust, and so also Cox, who received it, would have had to account for it, and the cestuis que trust could, if they had pleased, have rescinded the contract. But the vendors, who were acting for their beneficiaries, do not choose to repudiate the contract; they claim specific performance of it by the counter-claim, and it seems to me that when they withdrew their right to repudiate the contract they placed the parties in the same position as they would have been if the matter had not been tainted with this giving and taking of a bribe. To use, not the exact words, but the substance of what was said in *Dering* v. *Earl of Winchelsea* (1), in order to prevent a man coming for relief in connection with a transaction so tainted it must be shown

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(1) 1 Cox, 318; 2 Wh. & T. L. C. 8th ed. 539.

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that the taint has a necessary and essential relation to the contract which is sued upon, and it is not enough to say in general that the man is not coming with clean hands when the relief he seeks is not based on the contract which was obtained by fraud, but is to have the contract annulled on a ground which exists quite independently of the fact that a bribe has been given and received. In my opinion that point also fails and the judgment of the learned judge was right, and the appeal must be dismissed.

SCRUTTON L.J. I should have contented myself with agreeing with the judgments which have just been delivered but for the fact that I think the principles in this case go very much further than the particular facts of the case and are of considerable importance to the public and to the profession of solicitors. The case has occupied some time, partly on account of the importance of the principles to be considered and partly because there are in it certain unpleasant features, and one has been anxious to see that one exactly appreciates the extent of those unpleasant features, and does not allow them to warp or bias one's judgment unduly.

The plaintiff had a contract with the defendants Hatt and Cox, trustees of Lee's estate, for the purchase of a public-house in Reading. He claims to rescind that contract on the ground that Hatt and Cox were acting as his solicitors and have made with him a contract disadvantageous to him, and in particular have not disclosed all the facts, material to the contract, of which they were aware. The defendants reply that there was no relation which obliged them to make such disclosure between themselves and Moody, and that there was nothing disadvantageous in the contract.

Before I consider that, which is the material part of the case, I will mention, to put on one side, the question of the two bribes. Moody gave, and Cox took, two sums of 100*l.*, partly in consequence of something said before the contract was entered into and partly in consequence of something said after the contract was entered into. Those sums are described by Moody on his counterfoil as "emolument." They are given by Moody to the clerk of a man he was negotiating with and a trustee from whom he was buying the property for the purpose of influencing his performance of the contract. Counsel for the defendants have, as their duty was, endeavoured to argue as to the morality or justifiability of those payments. I think there should be no mistake about it that the Court considers them bribes of the most objectionable character. The defendant Hatt has been anxious, and rightly anxious, that it should be clear that he had nothing to do with the offering or taking of those bribes. I agree that he had nothing to do with them, but I should have been more impressed with his desire to clear himself from the bribes if I had not found him retaining in his service as confidential clerk the man who had received those bribes.

It is contended that the fact that Moody has given those bribes prevents him from getting any relief in a Court of Equity. The first consequence of his having offered the bribes is that the vendors could have rescinded the contract. But they were not bound to do so. They had the right to say " No, we are well satisfied with the contract; it is a very good one for us; we affirm it." The proposition put forward by counsel for the defendants is: " It does not matter that the contract has been affirmed; you still can claim no relief of any equitable character in regard to that contract because you gave a bribe in respect of it. If there is a mistake in the contract, you cannot rectify it; if you desire to rescind the contract, you cannot rescind it, for that is equitable relief." With some doubt they said: " We do not think you can get an injunction to have the contract performed, though the other side have affirmed it, because an injunction may be an equitable remedy." When one asks on what principle this is supposed to be based one receives in answer the maxim that any one coming to equity must come with clean hands. I think the expression " clean hands " is used more often in the text-books than it is in the judgments, though it is occasionally used in the judgments; but I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary right to affirm it, not being an illegal contract, the Courts of Equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in *Dering* v. *Earl of Winchelsea* (1) which has been referred to shows that equity will not apply the principle about clean hands unless the

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(1) 1 Cox, 318; 2 Wh. & T. L. C. 8th ed. 539.

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depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. In this case the bribe has no immediate relation to rectification, if rectification were asked, or to rescission in connection with a matter not in any way connected with the bribe. Therefore that point, which was argued with great strenuousness by counsel for the defendant Hatt, appears to me to fail, and we have to consider the merits of the case.

First of all as to the law. Generally when you have made a legal contract and correctly expressed it in writing, and it has not been obtained by any misstatement of fact, innocent or fraudulent, the contract stands, and the fact that one party or the other knows facts about which he says nothing, which make the contract an unprofitable one to the other party, is of no legal importance. But there are certain relations and certain contracts in which a higher duty is imposed upon the parties, and they must not only tell the truth, but they must tell the whole truth so far as it is material, and they must not only not misrepresent by words, but they must not misrepresent by silence if they know of something that is material. Some of those cases depend on the relation between the parties, and, generally speaking, are cases where the relation is such that you have confidence reposed by one party and influence exercised by the other. In that class of relation of parties you may get the duty, first of all, that the party who has influence must make a full disclosure of everything that he knows material to the contract; secondly, that the party who has the influence must not make a contract with the party over whom he has the influence unless he can satisfy the Court that that contract is an advantageous one to the other party. The second class of cases is one not depending on the relation of the parties, but depending on the nature of the contract; and a typical case of that kind is the contract of insurance, where to an underwriter who knows nothing comes an assured, a man who wants to be insured and who knows everything, and on him is imposed the duty of telling the man who knows nothing all that he knows, so that the underwriter may fix the premium. In the first class of relations that of solicitor and client is one of the obviously and constantly recognized examples. If a man who is in the position of solicitor to a client so that the client has presumably confidence in him, and the solicitor has presumably influence over the client, desires to contract with his client, he must make a full disclosure of every material fact that he knows, and must take upon himself the burden of satisfying the Court that the contract is one of full advantage to his client. Lord Eldon, in the passage which has been referred to in *Gibson* v. *Jeyes* (1), said: "This clear duty results from the rule of this Court, and throws upon him the whole onus of the case; that, if he will mix with the character of attorney that of vendor, he shall, if the propriety of the contract comes in question, manifest, that he has given her all that reasonable advice against himself, that he would have given her against a third person. It is asked, where is that rule to be found. I answer, in that great rule of the Court, that he, who bargains in matter of advantage with a person placing confidence in him is bound to shew, that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys, or any one else." It has been expressed in more general form by Lord Chelmsford in *Tate* v. *Williamson* (2): "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed." This is rested on confidence by the client and corresponding influence by the solicitor.

Two questions will arise in cases of solicitor and client—first, as to the relation which will create this obligation, and, secondly, as to the nature of the obligation created. Where the relation of solicitor and client occurs in the very transaction attacked it will, in my view, be almost, if not quite, impossible to avoid the obligation, and an independent solicitor should be employed by the client. It is called "putting him at arm's length." It might perhaps also be effected by a clear declaration of the position by the vendor, such as this: "Mind, I am going to get the highest price I can; be on your guard"; but the position would have to be made very clear in order to relieve the solicitor of obligations far exceeding

(1) 6 Ves. 266, 278.

(2) L. R. 2 Ch. 61.

those of an ordinary vendor, and is a position to be avoided. More difficult questions arise when the employment as solicitor has been in other matters more or less numerous or recent, and the transaction in question is a separate transaction in which the solicitor does not act as such. It is a question of degree in every case. Turner L.J. in *Holman* v. *Loynes* (1), after examining the cases which were said to limit the duty of a solicitor, said: "The very ground of the rule which requires attornies purchasing from their clients, and not advising them with reference to the purchase, to prove that the confidential relation has been determined or the client put at arm's length, is the influence which arises from the position of attornies; and I much doubt whether the confidential relation can be said to be determined at all, whilst the influence derived from it can reasonably be supposed to remain. Gifts from clients to their attornies can be maintained only, when not only the relation has ceased but the influence may rationally be supposed to have ceased also. That was laid down by Lord Eldon in *Wood* v. *Downes* (2); and I see no reason why the rule, which applies to gifts, should not equally in this respect apply to purchases. It is true that the rules of the Court against gifts are absolute, and that against purchases they are modified; but this is a question, not upon the extent of the rules, but upon the circumstances under which they are to be brought into operation, and in that respect I see no difference between the cases of gifts and purchases." The relation may then be an actual relation of solicitor and client in the transaction impugned, or such an antecedent relation as gives rise to the influence by the solicitor and confidence by the client the effect of which has not ceased at the time of the transaction impugned. It usually arises where the relation of solicitor precedes that of vendor. In the present case the man is first vendor, then solicitor.

What are the facts in this case if that is the law? About the middle of January Moody was negotiating with the trustees according to the entry in Hatt's bill. Moody was told that he would have to pay the costs of negotiation. I do not think that by itself is enough to make the relation of solicitor and client, but when on February 8 the same term is put in the contract we had Cox's own statement of what happened. I am not taking Cox as a witness to whom

(1) 4 D. M. & G. 270, 283.

(2) (1811) 18 Ves. 120.

implicit credit should be given, and this statement tells against him: "After the contract of February 8 was signed we acted as solicitors. He said, 'You know all about it; I want you to act for me.'" Once a solicitor is in that position, and the client has said to him "You know all about it; I want you to act for me," and he accepts the position, it will be very difficult for him to escape from the obligation attaching to a solicitor to make full disclosure, and not to contract with his client unless he can satisfy the Court that the contract is for the client's benefit. It seems to me the full duty to disclose was on Hatt. How did he perform it? Again I take Cox's own evidence. Part of the subject-matter of the contract was some cottages. Cox had had a valuation made within a month or two months valuing those cottages at 160*l.* a cottage. He sold them to Moody at 225*l.* a cottage. He did not tell Moody of the valuation; and in his evidence, moreover, he stated as follows: "I did say the cottages were worth 225*l.*; I knew they were not worth it because I had been advised they were worth a good deal less. I knew the value of the Marquis of Granby had depreciated since the probate valuation; I did not tell him the amount of the probate valuation." A man who says that admits in the plainest terms that he is not fulfilling the duty which lies upon him as a solicitor acting for a client. But it is said that he could not disclose that information consistently with his duty to his other clients, the cestuis que trust. It may be that a solicitor who tries to act for both parties puts himself in such a position that he must be liable to one or the other, whatever he does. The case has been put of a solicitor acting for vendor and purchaser who knows of a flaw in the title by reason of his acting for the vendor, and who, if he discloses that flaw in the title which he knows as acting for the vendor, may be liable to an action by his vendor, and who, if he does not disclose the flaw in the title, may be liable to an action by the purchaser for not doing his duty as solicitor for him. It will be his fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them. The law being what I have stated, and having regard to Cox's own

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evidence, it seems to me clear that Hatt, his employer, has not complied through him with the obligations which rest upon a solicitor, he has not disclosed to Moody things that he should have disclosed, and he has made actual misrepresentations material to the contract.

On these two grounds it appears to me that the judgment of Younger J. is thoroughly justified, and the appeal must be dismissed.

Solicitor for appellants: *P. F. Walker.*
Solicitors for respondent: *Stanley Evans & Co.*

G. A. S.

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April 19.

In re SUGDEN'S TRUSTS.
SUGDEN *v.* WALKER.

[1916 S. 1724.]

Settlement—Power of Appointment amongst Children—Marriage of only Child—Separation Deed—Donee of Power Party to Deed for special Purpose—Effect of Recital—Release of Power by Implication.

E. T. under her father's will had a power of appointment by deed or will over one twelfth of his residuary estate in favour of her children and remoter issue, such issue to be born in her lifetime. The value of the twelfth share was about 17,000*l.* L. T., the son and only child of E. T., married in 1889 and had two children, both born in E. T.'s lifetime.

In 1900, by a separation deed made between L. T. of the first part, his wife of the second part, E. T. of the third part, and trustees of the fourth part, after reciting an agreement between the parties of the first three parts that L. T. and his wife should enter into a separation deed, to which E. T. should be a party and should enter into such covenant as thereinafter contained, and that L. T. should make such settlement as thereinafter contained, and that he was entitled to one twelfth of the residuary estate of his grandfather, subject to E. T.'s life interest therein, the parties of the first, second, and fourth parts entered into mutual covenants providing for the husband and wife living apart. E. T. separately covenanted to pay during her life to L. T. the sum of 300*l.* per annum, and then L. T., as settlor, assigned to the trustees the sum of 10,000*l.* to be raised out of the said share to which he was entitled in reversion as soon as it fell into possession, to be held on trusts (in the events which happened) for the benefit of his two children. In February, 1909, L. T. died, and by his will left his estate to charities. Subsequently E. T. by a deed poll appointed the twelfth share upon trusts for the benefit of L. T.'s two children and their respective issue to be born in her lifetine. E. T. died in 1915, and the question arose whether the separation deed had in any way affected her power of appointment:—

Held, varying the order of Neville J. [1917] 1 Ch. 511, that, having regard to the terms of the separation deed and the surrounding circumstances, the intention of the parties was that E. T. should release her power of appointment to the extent of 10,000*l.* only, and consequently that the deed poll operated as an effective appointment of the balance of the twelfth share in favour of L. T.'s two children and their respective issue.

APPEALS AND CROSS-APPEAL from a decision of Neville J. (1)

Samuel Sugden, who died in 1896, by his will settled one twelfth share of his residuary estate upon trust for his daughter Emily Terry for life, and subject thereto for such of her children and remoter issue (such issue to be born in her lifetine) as she should by deed or will appoint. Emily Terry had one child only, Louis Terry, who had issue two children only, Noel Terry and Kathleen Terry, both born in the lifetime of Emily Terry. By a separation deed executed in 1900 between Louis Terry of the first part, his wife of the second part, Emily Terry of the third part, and trustees of the fourth part, after reciting an agreement between the parties of the first three parts that certain proceedings for a judicial separation between Louis Terry and his wife should be discontinued and that a deed of separation should be entered into, to which Emily Terry should be a party, and should enter into such covenant as was by her thereinafter contained, that Louis Terry should make such settlement as was thereinafter contained, and that he was under the will of Samuel Sugden entitled to one twelfth share of the testator's residuary estate subject to his mother's life interest therein, it was witnessed that the parties thereto of the first, second, and fourth parts entered into mutual covenants defining the terms on which the husband and wife should live apart, and Emily Terry separately covenanted to pay during her life an annuity of 300*l.* to Louis Terry, out of which he was to provide for his wife; and it was further witnessed that Louis Terry as settlor assigned to the trustees the sum of 10,000*l.* to be raised out of the said share to which he was entitled in reversion as soon as it fell into possession, to hold the

(1) [1917] 1 Ch. 511.

same upon trust (in the events which happened) as to one moiety for Noel Terry and as to the other moiety for Kathleen Terry. Louis Terry died in February, 1909, having by his will given all his property to certain charitable institutions.

By a deed poll dated March 18, 1909, Emily Terry, after reciting her power of appointment, in exercise thereof irrevocably appointed the one twelfth share of her father's residuary estate, as to one moiety on trusts for the benefit of Noel Terry and his issue born in her lifetime, and as to the other moiety on like trusts for Kathleen Terry and her issue.

Noel Terry married in 1912 and had issue a daughter, Dorothy Terry, born in Emily Terry's lifetime.

Emily Terry died in 1915, and the question then arose whether the deed poll of March 18, 1909, was an effective exercise of her power of appointment under the testator's will, or whether by joining in the separation deed of 1900 she had to any and what extent released her power.

Neville J. (1) held that the question was one of intention to be inferred from the terms of the separation deed and the surrounding circumstances, and the true inference was that Emily Terry thereby wholly released her power of appointment, and that consequently the 10,000*l.* was subject to the trusts of the separation deed, and the 7000*l.* passed under Louis Terry's will.

From this decision there were two appeals, one by Kathleen Terry and the other by Noel Terry; and a cross-appeal by Dorothy Terry.

Jenkins, K.C., and *Metcalfe*, for Kathleen Terry. Emily Terry, by joining in the deed of 1900, only released her power of appointment pro tanto. She had no intention to do more than release it to the extent of the 10,000*l.* It was a term of the arrangement that the property subject to her power should, as to 10,000*l.*, be dealt with in a certain way. It was no part of that arrangement that the power to appoint the remaining 7000*l.* should be released: *Lovett* v. *Lovett* (2); *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (3); Farwell on Powers, p. 19.

P. F. S. Stokes, for Noel Terry.

(1) [1917] 1 Ch. 511.

(2) [1898] 1 Ch. 82.

(3) (1873) L. R. 6 H. L. 352, 360.

J. F. Carr, for Dorothy Terry. The deed of 1900 did not operate as an exercise or release of the power of appointment at all. Emily Terry, by joining in that deed for the specific purpose of covenanting to pay the 300*l.* a year, cannot from that fact alone be considered as having joined for a totally different purpose, namely, of releasing her power in whole or in part: *In re Horsfall* (1). Apart from the covenant referred to the deed would have been quite as effective if she had not joined in it at all. It is not equitable to hold her bound by all the recitals in the deed. Her concurrence in the deed for purposes unconnected with the power did not operate as an exercise or release thereof: *Griffith-Boscawen* v. *Scott.* (2)

Maugham, K.C., and *F. K. Archer* (for *C. D. Myles*, serving with His Majesty's Forces), for the executor of Louis Terry. By the deed of 1900 Emily Terry released her power of appointment to its full extent. There was a clear tripartite agreement involving a provision for the wife of Louis Terry on the death of Emily Terry, and the provision of an income for her in the meantime. That could only be effected by Emily Terry releasing her power over the 10,000*l.*

[LORD COZENS-HARDY M.R. We agree with you as to that.]

It follows as a necessary consequence that the power was wholly released. The assignment is by Louis Terry of the sum of 10,000*l.* to be raised out of the one twelfth share to which he was entitled in reversion. The agreement to release the power was not limited to the 10,000*l.*

G. M. T. Hildyard, for the trustees of the testator's will.

LORD COZENS-HARDY M.R. (after stating the facts). The question arises whether the deed poll executed by Emily Terry in March, 1909, is a valid exercise of her power of appointment. There is really no question of construction. If the mother had at that time a power of appointment over the one twelfth share or any part of it she exercised it in favour of her two grandchildren and her great-grandchild Dorothy. It is said, and the learned judge has taken that view, that the appointment in favour of the grandchildren and great-grandchild is invalid, because any right which Emily

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(1) [1911] 2 Ch. 63.

(2) (1884) 26 Ch. D. 358.

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Lord Cozens-Hardy M.R.

Terry had to exercise the power of appointment was released by her being a party to the separation deed.

I am unable to agree to that view for these reasons. I think the decision of the learned judge, so far as he decided that the power could not be exercised to the extent of the sum of 10,000*l.*, is perfectly sound. She was a party to the separation deed, and it was part of the arrangement made by that deed that the son Louis Thomas should settle the sum of 10,000*l.*, part of what was called his one twelfth share, upon certain trusts therein mentioned. She had made that arrangement as appears by the recitals, and it seems to me impossible that she could be allowed to defeat that provision by so exercising her power of appointment as to take the sum of 10,000*l.* entirely away from Louis Thomas Terry or his assignees. That has not been seriously contested. Mr. Carr has put his point clearly, but I feel no doubt that the learned judge was perfectly right in saying that the sum of 10,000*l.* was not perhaps appointed under the separation deed in this sense, but was so dealt with that the power of appointment over so much of the share as was required to make good the 10,000*l.* could not be otherwise exercised. Then it is said: But what about the rest ?—7000*l.* I will call it. The value of the share was, I gather, substantially 17,000*l.* What reason is there for saying that Emily Terry in any way deprived herself of the power of exercising her limited power of appointment over the sum of 7000*l.* ? I am bound to say that I can see no reason for coming to that conclusion. The learned judge in the Court below seems to have been rather impressed with this. It is said that the deed of separation recites that Louis Thomas is entitled to a one twelfth share in reversion expectant upon his mother's death, and that that ought to be treated as though it were either an appointment in favour of Louis, so defeating the other objects of the power, or at least as giving colour to that construction of the deed, and therefore that the Court is prevented from saying that the assignment of the sum of 10,000*l.*, part of the one twelfth share, is other than what, in terms, it really is. But it is said that it is an assignment of the whole one twelfth by the son, that the mother concurred in it, and that it is conclusive. I do not follow that at all. It seems to me to be a narrow and unreasonable construction, and if effect be given to what I regard as the manifest intention of the parties as appearing under this deed I hold that the sum of 10,000*l.* is vested in the trustees of the separation deed, and the other sum of 7000*l.* now belongs to the grandchildren and the great-grandchild under the terms of the appointment by Emily Terry of March, 1909.

For these reasons I am unable entirely to agree in the judgment of Neville J., and I think the order made by him ought to be varied.

BANKES L.J. I agree. I do not take the same view as the learned judge, and I will state quite shortly the reasons why I am unable to agree with his view. The learned judge seems to have treated the question as though the matter for consideration were the intention of the mother as gathered from the whole of the terms of the separation deed. I am unable to take that view. It seems to me that the separation deed quite plainly indicates by the recital that there had been an antecedent tripartite agreement between the mother, the son, and the daughter-in-law, and it was for the purpose of giving effect to that agreement that this separation deed was entered into. Now the object of the tripartite agreement, the consideration for which was the withdrawal by the daughter-in-law of her petition for judicial separation, was to secure the daughter-in-law's position, and not to improve the son's position; and for the purpose of securing the daughter-in-law's position the son was to assign a sum of 10,000*l.* to which he was entitled, subject to his mother's life interest and power of appointment, under his grandfather's will, and in order to make that assignment possible and effective it was necessary for the mother to agree either to release her power of appointment to the extent of the sum of 10,000*l.* or to agree not to exercise it, and that, as it seems to me, is the tripartite agreement which is recited in the first recital of this separation deed. It recites that it has lately been agreed between the said parties—these three—that a petition presented in the Divorce Division of Her Majesty's High Court of Justice by the daughter-in-law for a judicial separation from the son should be dismissed upon the terms and conditions therein mentioned, the principal, or one of the principal, terms being the assignment of this sum of 10,000*l.* to secure a provision for the daughter-in-law. It is not a question of implied intention or estoppel. It is a question of what

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agreement the mother made, and it seems to me it is plain that she did mean to enter into an agreement the effect of which was that she would not exercise her power of appointment so as to defeat the son's covenant with regard to that sum of 10,000*l*. She agreed to that, and by that agreement it seems to me she is bound. Now why should she be bound by anything more? To bind her or to suggest that she made an agreement which would cover her right to exercise her power of appointment over any difference between the sum of 10,000*l*. and the full value of the share seems to me to suggest that she was making an agreement, not to secure the daughter-in-law, but for the benefit of her son. Now why should she do that? There was no conceivable reason why she should do it, and there is no indication in the recital of what she had agreed to that any reference had been made or need have been made to that matter. But then it is said that the second recital indicates that the deed was drafted on the footing that the son was absolutely entitled to the whole share. Assuming that it was, why should the mother be bound by that? The first recital states what she has agreed to. Why should she be bound by anything more than what the document itself states that she agreed to? If the view put forward as to the footing upon which the deed is drafted is right, it seems to me that the judgment of Parker J. in *In re Horsfall* (1) would apply, and there is no ground whatever for saying that the mother is bound by a recital or by a portion of the operative part of the deed which went beyond what the deed itself shows she had agreed to. On those grounds I think that this appeal succeeds.

WARRINGTON L.J. I am of the same opinion. At the date of her death Emily Terry had under her father's will a power to appoint a certain fund amongst her children or other issue born in her lifetime. Before her death she had executed a deed of appointment appointing a fund in favour of her two grandchildren and one great-grandchild. The question we have to determine is whether that appointment is to any and what extent effective. It is said, and the contention has been accepted by Neville J., that the effect of a deed which she had executed on November 21, 1900, was to

(1) [1911] 2 Ch. 63.

release or extinguish or prevent her from exercising her power of appointment altogether.

The question, I think, really depends upon the determination of what is the true effect of the deed of November 21, 1900, and to that extent it is a question of construction. [The Lord Justice referred to the terms of the deed and continued :]

The question is, Did Emily Terry by this deed agree, and if she did, then to what extent, that she would not exercise the power of appointment ? I think it is quite clear that she did agree that she would not exercise the power of appointment so as to prevent the assignment, which she had already agreed should be made, taking effect. I think it is quite clear that so far she did agree not to exercise her power; but did she agree any further ? I cannot so hold. The deed had nothing to do with any power, and did not purport to deal with any part of the one twelfth share except the sum of 10,000*l.* It seems to me that to hold that she thereby agreed not to exercise the power to an extent beyond what was necessary for the purpose of giving effect to the assignment of the sum of 10,000*l.*, would give the deed an effect which it was not intended to have. The learned judge has thought that he could see in the recital of the title of her son Louis Thomas Terry, and in the fact that in that recital there is no mention of the power of appointment, an intention in the mind of Emily Terry that she should not exercise the power. I do not think that any such intention, even if the existence of such intention were material, can be derived from that recital. The recital is perfectly accurate so far as it goes. It was perfectly accurate so far as was necessary to give effect to the intention of the parties, assuming the intention to be that which is expressed in the recital, namely, that Louis Thomas Terry should make an assignment, and an effectual assignment, of the sum of 10,000*l.* On the whole I agree that the order appealed from is incorrect and ought to be varied accordingly.

Solicitors: *Trower, Still, Parkin & Keeling; Walker & Battiscombe; Tatham, Oblein & Nash; Edgar Robins & Grimsdall; Wilson & Son.*

G. A. S.

EVE J.
1917
May 17, 25.

In re INDO-CHINA STEAM NAVIGATION COMPANY.

[1917 I. 41.]

Company—Blank Transfer of Shares—Registration—Rectification—Dispute between Transferor and Transferee—Alteration of Register by Secretary—Stamp Duty—Validity—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 32; *Stamp Act,* 1891 (54 *&* 55 *Vict. c.* 39), *s.* 17.

Sect. 32 of the Companies (Consolidation) Act, 1908, is brought into operation so soon as there is a person alleging himself to be aggrieved by an improper entry in or omission from the register, and thereupon it is open to the person so aggrieved or to the company, or to any member of the company, to come to the Court under that section.

H. sold to M. H. & Co. (in whose employment he then was as general manager) 930 shares in the Navigation Company for sums exceeding 18,000*l.* Of these shares 870 were transferred to M. H. & Co. or their nominees, but in respect of the remaining 60 shares, owing to some mistake as to their title, all they received was the certificate and a transfer in blank under seal executed by H. Subsequently M. H. & Co. filled in the blank transfer with the name of G. (who was a clerk in their employment) and left the same, purporting to be for a nominal consideration of 10*s.* and stamped with a 10*s.* stamp only, together with the certificate, for registration by the Navigation Company. H. (who had been dismissed from his employment by M. H. & Co., with whom he was now engaged in litigation) in reply to the usual notice given to him by the Navigation Company of the intended transfer to G., asked that it should not be registered without further notice to himself, but owing to changes in the staff this circumstance was overlooked and G.'s name was placed on the register. Subsequently, and before a new certificate was issued to G., the secretary of the Navigation Company, having discovered the correspondence with H., purported to amend the register by striking out the entries showing G. to be the owner of the shares and restoring the entries showing H. to be the owner thereof. Some correspondence followed, in which H. took up the position that he was now on the register, and that if G. wished to be registered he should apply to rectify the register under s. 32 of the Companies (Consolidation) Act, 1908. As neither H. nor G. moved further in the matter, the Navigation Company itself took out this summons under s. 32 asking for an order that the company might be authorized to restore and retain G.'s name as the owner of the shares. Prior to the issue of the summons the transfer had been duly stamped with an ad valorem stamp and a penalty paid. It was not now disputed that the 60 shares in question formed part of the 930 shares sold by H. to M. H. & Co. The articles of association of the Navigation Company did not require a transfer to be made by deed, but only by an instrument in writing :—

Held, that under the circumstances the summons was properly taken out by the Navigation Company.

Held, also, that the alteration in the register made by the secretary of the Navigation Company was a mere nullity.

Held, also, that the registration of the transfer to G. having been made by the Navigation Company without notice of the insufficiency of the stamp duty, and the ad valorem stamp duty and penalty having been since paid, the name of G. ought to remain on the register and the costs of this summons must be paid by H.

ADJOURNED SUMMONS.

This was an originating summons taken out by the Indo-China Steam Navigation Company (herein called the Navigation Company) under s. 32 of the Companies (Consolidation) Act, 1908, asking by paragraph 1 for an order that (notwithstanding the claim of the respondent Hopkinson to be the owner of 60 shares therein mentioned) the company might be authorized to rectify the register of shareholders by making such alterations as might be necessary for the purpose of restoring and retaining the name of the respondent Green on the register as the holder of the shares in question. The facts of the case sufficiently appear from the head-note, and are fully stated in the judgment of Eve J.

Clayton, K.C., and *C. W. Turner*, for the summons.

Gore-Browne, K.C., and *F. Whinney*, for the respondent Green. The articles of association of the Navigation Company do not require a transfer to be by deed, and there is ample authority that in such a case, though the transfer is void as a deed, the presence of the seal does not prevent it from being valid as an agreement, and as such this transfer conferred the right on Green to call on the company to register him as transferee, Mortimer Harley & Co. having authority to fill up the transfer with the name of Green as transferee : *Ex parte Sargent* (1) ; *Davies' Case* (2) ; *Ortigosa* v. *Brown, Janson & Co.* (3) ; *Ireland* v. *Hart* (4) ; Buckley on Companies, 9th ed. p. 577.

It is not in dispute that the purchase-money for these 60 shares was paid to Hopkinson as part of the 930 shares sold by him to Mortimer Harley & Co., and there is no equity or right of lien on the part of Hopkinson to prevent the due registration of the transfer to Green.

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(1) (1874) L. R. 17 Eq. 273.

(2) (1876) 33 L. T. 834.

(3) (1878) 47 L. J. (Ch.) 168 ; 38 L. T. 145.

(4) [1902] 1 Ch. 522.

Maugham, K.C., and *Owen Thompson*, for Hopkinson. We admit that the 60 shares in question formed part of the 930 shares sold by Hopkinson to Mortimer Harley & Co., but we object on technical grounds to the order asked for being made on this summons. If the alteration made by the secretary of the Navigation Company in the register is a nullity then Green's name is still on the register, and in the absence of any application by Hopkinson to rectify the register any application by the company is misconceived, and the summons should be dismissed with costs. But in any case we contend that Green's name ought not to have been placed on the register and ought not to remain there, the instrument of transfer having been improperly filled up with a 10*s.* consideration and improperly stamped with a 10*s.* instead of an ad valorem stamp. If the directors of the Navigation Company had been aware of the insufficiency of the stamp it would have been their duty to refuse to pass the transfer: Stamp Act, 1891, s. 17; *Maynard* v. *Consolidated Kent Collieries Corporation* (1); Buckley on Companies, 9th ed. p. 583. The delivery of this document to Mortimer Harley & Co. conferred no authority to use it for the purpose of carrying out a contract for sale of these shares.

Gore-Browne, K.C., in reply. There is no dispute as to the title to these shares, and there is no substance in the technical objections to the summons. The Navigation Company were entitled to take out the summons under s. 32. It does not appear whether the nominal consideration was filled in before or after the delivery to Mortimer Harley & Co., and in any case it does not lie in Hopkinson's mouth to take this objection. The insufficiency of the stamp did not render the transfer void, and the subsequent payment of the additional duty removes any objection on this ground.

Cur. adv. vult.

May 25. EVE J. delivered the following written judgment:—In the month of March, 1916, the respondent Cyril Oswald John

(1) [1903] 2 K. B. 121.

Hopkinson sold to Mortimer Harley & Co., in whose employ he then was as general manager, 930 fully-paid deferred ordinary shares of 5*l.* each in the capital of the Indo-China Steam Navigation Company, for sums amounting in all to 18,541*l.* 17*s.* 6*d.* Of these shares 870 were transferred to the purchasers or their nominees, but in respect of the remaining 60 all they received was the certificate and a transfer in blank executed by the vendor. To this transfer I shall have occasion to refer more particularly by-and-by, but in order to explain the attitude which the vendor, who does not dispute that he has been paid for the shares, and who sets up no title to retain the same on the ground of lien or otherwise, has since adopted, I interrupt the narrative of events to state that immediately after this transaction of sale and purchase the purchasers purported to determine Hopkinson's engagement as their manager and commenced proceedings against him alleging that in this and other transactions he acted in breach of his duty towards them, and in these proceedings, still pending in the King's Bench Division, Hopkinson by counter-claim seeks to recover a large sum as damages for wrongful dismissal and in respect of other matters of which he complains. This position of affairs he treats as a sufficient justification for his opposing on technical grounds the making of any order on this summons which would have the effect of transferring to the nominee of the purchasers the shares which he sold to them and for which they paid him the purchase price. I resume now the statement of the facts. Early in April the purchasers filled in the name of the respondent Frank Ernest Green—a clerk in their employ—as transferee in the transfer executed by Hopkinson, and about May 20, the transfer with the certificate of the 60 shares was lodged with the Navigation Company for registration. This company, in accordance with its usual practice, gave notice of the lodging of the transfer to the transferor, and on his raising an objection to the registration being proceeded with some correspondence followed and the matter was allowed to fall into abeyance for a time. The subsequent events are disclosed in a letter of November 16, 1916, addressed by the solicitors of the Navigation Company to Mr. Hopkinson's solicitors in which they write: "In May last when the transfer to Mr. Green was put forward our clients communicated with Mr. Hopkinson in the usual way and at his request promised

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to delay registration of the transfer until they heard further from him. Owing, however, to changes of staff in London this correspondence was overlooked and the transfer was passed and Mr. Green's name was placed upon the register in July. The new certificate has not been handed to him, however, and on the correspondence with Mr. Hopkinson being discovered, the London secretaries, being under the impression that the registration of Mr. Green might not be justified, in fact amended the register. We are advised, however, that this amendment is nugatory and that Mr. Green is therefore the registered owner of the shares, and it is consequently proposed to hand the certificate over to him unless within fourteen days your client takes steps to establish his right to the shares."

Hopkinson's advisers in reply to this communication declined to accede to the view that the striking out of Green's name was nugatory, and after stating their opinion that Hopkinson was then on the register and that there was therefore nothing for him to do they concluded thus: "If Mr. Green wishes to be registered as the owner of the shares he has a very simple remedy by application to the Court by originating summons to be placed on the register, and this, we submit, is the proper course for him to pursue."

But neither Green nor Hopkinson would move in the matter, and after waiting for some weeks the company issued this summons under s. 32 of the Companies (Consolidation) Act, 1908, and served it upon both of them asking for an order that, notwithstanding the claim of Hopkinson to be the owner of the shares, the company may be authorized to restore Green's name to the register as the holder thereof. In other words, the company applies to the Court under sub-s. 1 of s. 32 to rectify the register by reinserting therein the name which was improperly struck out of, and is now without sufficient cause omitted from, the register, and on such application the Court has power under sub-s. 3 to decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register.

I point this out, because one objection raised on Hopkinson's behalf was that in view of the attitude adopted by the company in treating Green as the registered holder there were no grounds for any application under the section by the company or Green, and that in the absence of an application by Hopkinson there was nothing to discuss and the summons ought therefore to be dismissed. But in my opinion there is nothing in this objection. If it is a good answer to the company's summons it would be an equally good one to a summons by Green, but had he been the applicant it could hardly have been advanced seriously in view of the challenge contained in the letter from Hopkinson's solicitors and the invitation to Green to adopt this very procedure. But the short and conclusive answer to the objection is this, that the section is brought into operation so soon as there is a person alleging himself to be aggrieved by an improper entry in or omission from the register, and thereupon it is open to the person so aggrieved or to the company, or to any member of the company, to come to the Court under the section. Hopkinson had taken up the position of the person aggrieved some weeks before the summons was issued, and in these circumstances I have no doubt that the application is properly made and that I have jurisdiction to determine the rights of the respondents upon the summons.

Returning now to the transfer which Hopkinson signed and handed with the certificate to Mortimer Harley & Co., it is under seal, and it is not disputed that as a deed it is void and inoperative by reason of the additions made in it subsequent to its execution by Hopkinson, but the articles of association of the Navigation Company do not require shares to be transferred by deed, but by instrument in writing in the usual common form signed both by the transferor and transferee, and it is conceded that when Hopkinson took the purchase-moneys, and handed the blank transfer and certificate to Mortimer Harley & Co., he must be taken to have agreed to transfer the shares and to have authorized them to complete the transaction by such additions to the document as would enable them to have the shares legally vested in them or their nominees or assignees. He cannot and does not complain in these circumstances of the insertion of Green's name as transferee, but his point is that in inserting 10*s*. instead of the true purchase price as the consideration for the transfer Mortimer Harley & Co. or Green acted in excess of or contrary to any implied power or authority conferred on them or him by the delivery of the transfer, and that it is now competent for him to set up the case that the transfer so completed does not and cannot confer any right on the transferee to be registered as the legal owner of the shares. I think there are several answers to this objection. In the first place there is no evidence that the amount of the consideration was not already inserted when the transfer was handed to Mortimer Harley & Co. It is true, on the other hand, that there is no evidence that it was, but this is accounted for by the fact that Hopkinson never suggested this particular objection until the summons came on to be heard, and the doubt could not then be cleared up, as Green is absent on active service in the Navy, and the consideration and other written matter in the transfer is in his handwriting.

But, even assuming that the incorrect consideration was filled in after Hopkinson had executed and handed over the transfer and that the transfer was therefore inadequately stamped with a duty of 10*s.* and inoperative while so inadequately stamped as a transfer, I cannot see how Hopkinson with the full consideration money in his pocket, and without attempting to set up any right or title to or any interest in the shares, could have been heard in this Court successfully to assert the right to remain on the register in respect of the shares in breach of the contract of sale evidenced by his execution of the document and admitted by him to have been made.

No doubt had he, or for that matter had anybody else, given notice to the Navigation Company that the consideration was not truly disclosed and that the transfer was not duly stamped according to law, the directors of that company would have refused to register the transfer—see *Maynard v. Consolidated Kent Collieries Corporation* (1)— until satisfied on the point; but this refusal could, and of necessity would, have been withdrawn on their being satisfied that the proper duty had been paid and thereupon without any further reference to Hopkinson the transfer would have been registered. The fact that, as between the Navigation Company and Green, the former could properly have refused to register the transfer so long as it was insufficiently stamped could not, in my opinion, entitle Hopkinson to maintain the attitude that the transfer was void and his signature a nullity. The most he could do was to assert that which was undoubtedly the fact, that the registration of the transfer while

(1) [1903] 2 K. B. 121.

inadequately stamped could not operate to bring about a legal transfer of the shares into the name of the transferee.

But the fact is that the Navigation Company, so far from having notice of the insufficiency of the stamp duty paid on the transfer, were informed by a declaration subscribed by the manager of Mortimer Harley & Co. and by Green that it was sufficiently stamped with a 10*s.* stamp and thereupon registered the transfer and inscribed Green's name in the register as the holder of the shares. Although for reasons unconnected with this question of the stamp duty his name was subsequently struck out, this striking out was a wholly unauthorized act and must be disregarded. The transfer was subsequently stamped with the proper ad valorem duty, and the penalty for neglect to do this in the first instance has been paid. The position, therefore, when the summons came on to be heard was this, that Green's name was on the register, and the transfer, by virtue of which Hopkinson's name was taken off and Green's entered, had been validated by the payment of the additional duty. In these circumstances it is, in my opinion, impossible for Mr. Hopkinson to claim, as in effect he does, to have Green's name struck out and his own restored, and I make the order for which the company asks in paragraph 1 of the summons, and I further order Hopkinson to pay the costs of the company and of Green.

Solicitors: *Freshfields; Wansey, Stammers & Co.; Atkey, Clarke & Atkey.*

A. C.

SARGANT J.

1916

Dec. 7, 8.

1917

April 17.

GEIPEL *v.* PEACH.

[1914 G. 788.]

Company—Prospectus—Untrue Statements—Liability of Director—Death of Director—" Actio personalis moritur cum persona "—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 84, *sub-s.* 1.

The liability of directors, promoters, and others, under sub-s. 1 of s. 84 of the Companies (Consolidation) Act, 1908, to pay compensation to subscribers for shares or debentures for loss or damage sustained by untrue statements in prospectuses or reports is a liability in tort, and an action in respect of such liability does not lie against the executor of the tortfeasor unless by the latter's tortious act property or the proceeds or value of property belonging to the person injured have been added to the tortfeasor's estate.

Shepheard v. *Bray* [1906] 2 Ch. 235 not followed on this point.

This action was brought by William Geipel against William Henry Peach claiming 420*l.* compensation under the Companies (Consolidation) Act, 1908, with interest.

The defendant was, at the time of the issue of the prospectus below referred to, a director of the Gold Coast Rubber and Mahogany Estates, Limited (a company incorporated under the Act), and had authorized his being named, and he was named, in the prospectus as a director. The statement of claim alleged that in April, 1910, the defendant authorized and caused a prospectus of the company to be issued to the public and the plaintiff inviting them to subscribe for an issue of shares in the company, and that with the prospectus was issued a report by one Rogerson, and that reports by one Champion and one Tinney were incorporated by reference and quotation therein. The prospectus contained a number of statements which the plaintiff alleged to be untrue, and he also alleged that, with regard to such of the statements as purported to be made on the authority of an expert, or to be a statement by an expert, or contained in what purported to be a copy of or extract from a report or valuation of an expert, the defendant had no reasonable ground to believe that the person making the statement, report, or valuation was competent to make it. The plaintiff also said that, relying on the representations, and on the faith of the prospectus, he had subscribed for and had been allotted 4200 shares in the company, for which he had paid 420*l.*; that the shares were worthless; that the company was insolvent and had been compulsorily wound up; and that the plaintiff had lost 420*l.* by reason of the matters aforesaid.

The defendant, by his statement of defence, denied that the statements in the prospectus were untrue, and said that, if any of them were untrue, then, with regard to statements not purporting to have been made on the authority of an expert, when the prospectus was issued and up to allotment, the defendant believed, and had reasonable ground for believing, the same to be true. The defendant also said that all the statements relied on except one were contained in one or other of the reports of the three experts and fairly represented the statements in the reports, and denied that he had no reasonable ground to believe that the persons making the reports were competent to make them.

The action was tried on December 7 and 8, 1916. The defendant was examined and cross-examined and his evidence was completed. The trial was then adjourned until December 11, on which day, while some other evidence was being taken, his Lordship was informed that the defendant had died on December 10, and the trial was not further proceeded with.

By an order made on February 16, 1917, it was ordered that the further proceedings in the action should be carried on by the plaintiff against H. B. Peach (the defendant's executor) as defendant.

H. B. Peach moved for an order that the order of February 16, 1917, might be discharged on the ground that the action abated on and did not survive the death of the original defendant. The question whether this was so or not was accordingly argued.

Gore-Browne, K.C., and *J. Ricardo*, for H. B. Peach. The action is brought under s. 84 of the Companies (Consolidation) Act, 1908, which reproduces ss. 3 to 5 of the repealed Directors' Liability Act, 1890, and the amendment of s. 5 contained in s. 33 of the Companies Act, 1907. It is true that under sub-s. 4 of s. 84 "every person who by reason of his being a director" or the like "becomes liable to make any payment under this section may recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment, unless the person who has become so liable was, and that other person was not, guilty of fraudulent misrepresentation"; but apart from that provision the persons liable would be joint tortfeasors. The action would have been like an action for deceit, and of a personal character, and the executor of a deceased director whose estate was not proved to have benefited by the deceit could not be made liable to compensate the person injured by it: *Peek* v. *Gurney*. (1) An executor cannot prove what his testator believed or did not believe. Sect. 3 of the Directors' Liability Act, 1890, for which s. 84 of the Act of 1908 is substituted, shifted the burden of proving that the defendant did honestly believe, and on reasonable grounds, that untrue statements in a prospectus were true on to the defendant: *McConnel* v. *Wright*. (2) But even if the defendant failed to discharge that onus, and was himself liable, his executor could not be sued for the wrongful act unless property or the proceeds of value of property belonging to the plaintiff had been appropriated by the deceased person and added to his estate: *Phillips* v. *Homfray*. (3) No such appropriation and addition have been proved in the present case. The action is for a tort, although there is a statutory liability to contribute as in the case of a breach of contract: *Gerson* v. *Simpson*. (4) The plaintiff may rely on the observations of Warrington J. to the effect that the obligation of the director can be enforced against his executors and that the maxim "Actio personalis moritur cum persona" does not apply: *Shepheard* v. *Bray*. (5) But an appeal from that case was allowed by consent, Cozens-Hardy M.R. saying that it must not be assumed that the members of the Court, as then advised, were prepared to assent to all that Warrington J. had decided. (6) His decision, however, may be valuable as showing that, in order to make the executor liable, you must show that the deceased himself was liable. The question whether in an action under s. 3 of the Directors' Liability Act, 1890, the executors of a deceased director were liable was raised but not decided in *Frankenburg* v. *Great Horseless Carriage Co*. (7) The rule in favour

(1) (1873) L. R. 6 H. L. 377.
(2) [1903] 1 Ch. 546.
(3) (1883) 24 Ch. D. 439.
(4) [1903] 2 K. B. 197, 200.
(5) [1906] 2 Ch. 235, 253—254.
(6) [1907] 2 Ch. 571.
(7) [1900] 1 Q. B. 504, 510, 511.

of allowing actions against executors in respect of acts done by their testators has been narrowed, as in the case of an action for breach of promise of marriage: *Finlay* v. *Chirney*. (1) It lies on the plaintiff to show that the rule ought to be extended to a statutory liability for something which is not a tort apart from statute law. [They also referred to *In re Duncan* (2) and *Twycross* v. *Grant*. (3)]

F. G. Enness (*D. M. Hogg* with him), for the plaintiff. *Peek* v. *Gurney* (4) was in substance an action for deceit, which is quite different from an action in respect of a statutory liability to make "compensation," which is outside all the cases relied on by the defendant. Independently of the statute the plaintiff might have brought an action on the case. The company, by means of what the defendant did, obtained the money of the plaintiff and applied it in an unauthorized way. It is not clear even now that an action for breach of promise to marry will not lie against the promisor's executor where special damage is proved: *Quirk* v. *Thomas*. (5) This is not a statutory tort. The statute puts it on a contractual basis, and it is only necessary to show that the defendant has failed to perform a statutory duty. [He also referred to *Chamberlain* v. *Williamson* (6), *Hambly* v. *Trott* (7), and Palmer's Company Precedents, 11th ed. part i. p. 207.]

SARGANT J. This case raises an interesting point. The action is brought to recover compensation under s. 84 of the Companies (Consolidation) Act, 1908. The action was heard on December 7 and 8, and the defendant was examined and cross-examined and his evidence was completed. The plaintiff made out a good case against the defendant, and I took a strong view that the defendant was not to be trusted and had been guilty of fraud. On Monday, December 11, the examination of witnesses was completed, and the plaintiff's counsel was replying when I was told that the defendant had died on December 10—so the proceedings in the meantime were of no avail. The plaintiff obtained an order of course to revive the action against the defendant's executor, and it was

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(1) (1888) 20 Q. B. D. 494.
(2) [1899] 1 Ch. 387.
(3) (1878) 4 C. P. D. 40.
(4) L. R. 6 H. L. 377.
(5) [1916] 1 K. B. 516.
(6) (1814) 2 M. & S. 408.
(7) (1776) 1 Cowp. 371.

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agreed, upon an application to discharge this order of course, that there should be raised the whole question whether the action survived the death of the defendant or whether the maxim "Actio personalis moritur cum persona" applied.

If the action had been one for deceit, it is clear that, apart from the estate of the defendant being benefited by the wrong for which he was sought to be made liable, an action would not lie against his executor. In *Peek* v. *Gurney* (1) Lord Chelmsford says: "There can be no doubt that if an action at law had been brought by the appellant instead of this proceeding in equity, the executors could not have been made liable; and in the exercise of a concurrent jurisdiction by Courts of Law and Equity, both Courts . . . . ought to proceed upon the same principle. Now this is not like the cases referred to in argument . . . . where the wrong complained of benefited the estate of the testator, and on that account the executors were made liable. . . . . Mr. Gibbs' estate derived no benefit from the misrepresentation to which he was a party, and therefore his executors, who can only be answerable for his acts in respect of his estate, cannot be made liable for the wrong done to the appellant."

But the question remains whether, having regard to the action being in respect of a new statutory liability, that principle applies. The question was left open by the Court of Appeal in *Frankenburg* v. *Great Horseless Carriage Co.* (2), nor was there in that case any indication of judicial opinion on the point. But later there was a case of *Gerson* v. *Simpson* (3), from which some valuable indications of judicial opinion are to be gathered. There an action was brought under the Directors' Liability Act, 1890 (which s. 84 of the Act of 1908 replaces), and under the general law, for damages for alleged misrepresentations in a prospectus. The defendant said that another person was liable to contribute under the Act of 1890, and argued that the defendant's liability was contractual. Lord Halsbury L.C. said that the statute "states with unusual clearness that, with reference to this particular class of tort, and to this class of persons, namely, co-promoters and co-directors, who have issued a prospectus as in the present case, the ordinary rule that there shall be no contribution between tortfeasors shall not apply, but the rights of the parties shall be treated as though it were a question of contract, and not of tort." He evidently thought the whole liability sued on was in tort.

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(1) L. R. 6 H. L. 377, 392.

(2) [1900] 1 Q. B. 504.

(3) [1903] 2 K. B. 197, 200, 204.

The matter came again before the Court of Appeal after the defendant had had a verdict against him in respect of something within the Act of 1890, and presumably under the general law also, and judgment was given against a third party for contribution towards the amount of damages given against the defendant. Collins M.R. said: "There was ample evidence in my opinion to justify the finding of the jury against the third party. The result is that he was a joint tortfeasor with the defendant under circumstances in which he is liable to make contribution under s. 5 of the Directors' Liability Act, 1890." There is a direct statement that the liability of a person under the Act is that of a tortfeasor.

In *Shepheard* v. *Bray* (1) Warrington J. said: "But it is said that, whatever cause of action the plaintiffs may have had against Bray and Gaunt, there is none against their executors. They say, and say rightly, that they (the executors) are not persons who, if sued separately, would have been liable to make the payment in question, because the act on which the supposed plaintiff would rely is a tort committed by the testator, and actio personalis moritur cum persona." Later on he says that the "obligation to make contribution is one which in cases of contract could be enforced against the executors of a deceased co-contractor, and in my judgment the statutory obligation can also be so enforced. This argument on the part of the defendants, the executors, founded on the maxim 'Actio personalis moritur cum persona,' therefore fails." There was an appeal from the decision of Warrington J. (2) The appeal was compromised, but Cozens-Hardy M.R. said: "It must not be assumed that the members of the Court, as at present advised, having heard the arguments of the appellants and a good deal of the respondents in reply, are prepared to assent to all that Warrington J. has decided." Those observations, however, do not seem to touch the first part which I have read of the judgment of Warrington J.

I will now deal with the section itself. [His Lordship read s. 84, sub-ss. 1 to 3, of the Act of 1908, and continued :] The result of the section, so far, is not to alter the tortious nature of the acts in respect of which there is to be liability, but, speaking generally, to render it easier to establish liability against directors than in a common law action of deceit, by raising certain legal presumptions against them. Then sub-s. 4 provides for the recovery of contribution from other persons "as in cases of contract" by the persons rendered liable under the preceding provisions. And on this section it has been contended on behalf of the plaintiff that the effect of sub-s. 4 is that the liability under the previous sub-sections is one arising out of contract. It seems to me, on the contrary, that the effect of the sub-section is rather the other way —that is to say, that the sub-section implies that the liability is for a tort, and then goes on to provide that in this particular case the rule shall be that there shall be contribution as in cases of contract, and that the rule that there is no contribution among joint tortfeasors, which would otherwise apply, shall not be applicable.

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(1) [1906] 2 Ch. 235, 253.

(2) [1907] 2 Ch. 571.

There being then a tort, although it is one created or modified by statute, it seems to me that such a tort has in general all the ordinary incidents of a common law tort, and that an action in respect of it is amenable to the maxim "Actio personalis moritur cum persona," especially having regard to the fact that the statutory liability is so analogous to the old liability for deceit. Apart from the second point taken by the plaintiff, namely, the question of benefit, I hold that the action did not survive.

But then it is said that the estate of the defendant was benefited by his tort, and that the case comes within the well-known rule that where that is proved his executors are liable. The only evidence on this head is that the defendant received fees as a director of the company and underwriting fees; but it is said that as the moneys of the plaintiff went into the coffers of the company I am to assume that they went to benefit the defendant's estate. If I so decided, it would be in the teeth of the decision in *Phillips* v. *Homfray* (1), in which Bowen L.J. says that "the only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of

(1) 24 Ch. D. 439, 454.

a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys." The evidence here does not justify the conclusion that there has been any such appropriation or addition. The plaintiff's case therefore fails on this point also, and the action must be dismissed, but without costs.

Solicitors for plaintiff: *Jennings & Son.*
Solicitor for defendant: *G. C. Whadcoat.*

F. E.

In re AMALGAMATED PROPERTIES OF RHODESIA (1913), LIMITED.

[0082 of 1917.]

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SARGANT J.
May 22.
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May 25.

Company—Winding up—Petition of Judgment Creditor—Effect of pending Appeal from Judgment—Difference between Bankruptcy and Winding up—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 15, *sub-s.* 4.

An action by the A. Company against the G. Company was dismissed with costs, and the costs payable by the A. Company were taxed at a sum of over 65,000*l.* The G. Company served the A. Company with a statutory demand for payment under s. 130 of the Companies (Winding up) Act, 1908, and on non-compliance with the demand filed a petition for the winding up of the A. Company by the Court. In the meantime the A. Company, which had not applied to the judge who tried the action, or to the Court of Appeal, for a stay of execution on the judgment, lodged an appeal from the decision at the trial. The A. Company had after that decision charged its assets with a sum admitted to be a fund for supporting this appeal;—

Held, by Sargant J., that the appeal was not a defence to the petition, but that a winding up order must be made which must lie in the office for a limited time, and that, if within that time the A. Company gave security to the registrar's satisfaction for the amount of the judgment debt, the petition must be dismissed, the A. Company paying the costs.

On appeal from this decision, by an arrangement suggested by the Court the A. Company was given the alternative of giving to the G. Company within the same limited period a security on its assets, subject as to those already specifically charged to the specific charges thereon, but free from the charge created after the judgment (the holders of the latter charge joining to postpone their security), the charge to be given to secure not only the amount of the judgment, but also to secure such costs of the appeal, not exceeding 10,000*l.*, as the A. Company as appellants might be ordered to pay.

Per Sargant J.: The provisions of s. 5, sub-s. 4, of the Bankruptcy Act, 1914, do not apply, either directly or by analogy, to proceedings to wind up a company.

THIS was a petition by the Globe and Phœnix Gold Mining Company, Limited, to wind up the Amalgamated Properties of Rhodesia (1913), Limited. The petition was the outcome of some extremely heavy litigation in which the respondents were plaintiffs and the petitioners defendants. As the result of the litigation the action of the respondents was dismissed with costs, except for a certain set-off. The costs were directed to be taxed, and on March 31, 1917, the taxing Master certified, as the result of the taxation, that the balance due to the defendant company, now the petitioners, from the plaintiff company, now the respondents, was 65,692*l.* 19*s.* 9*d.* At that time the plaintiff company had already—about February 23, 1917—resolved to appeal from the judgment against them, and the appeal was set down on March 2. On April 5 the defendant company served on the plaintiff company the statutory demand under s. 130 of the Companies (Consolidation) Act, 1908, requiring them to pay the amount of the costs. On the day after that on which the time for complying with the notice expired an application was made to the Court of Appeal as to the hearing of the appeal—not for the purpose of expediting it, but for the purpose of having a convenient date fixed, and rather by way of postponement. The counsel on both sides suited each other's convenience to a certain extent, but it was admitted that nothing took place which in any way altered or waived any right that the defendant company had with reference to the payment of the large sum due for costs. The date fixed for the hearing of the appeal was June 6. On May 4—within about a week after the expiration of the time stated in the statutory demand—the defendant company presented the present petition. On May 7 the defendant company, the petitioners, made a search and thereby discovered that on March 30 a charge had been given by the plaintiff company, the respondents to the petition, to secure sums not exceeding 30,000*l.*, and it was admitted that the charge was given for the purpose of raising funds to prosecute the appeal. Neither at the time when the judgment was pronounced by Eve J. nor at any subsequent time had there been any application by the respondents for a stay of execution on the judgment obtained by the petitioners. At a meeting of the shareholders of the petitioning company held early in May the chairman of the company stated that, on the advice of their counsel, the company had taken no steps to get security for costs, but that they were taking what they considered to be more effective steps in trying to wind up the respondent company; that a petition had been presented, which, he hoped, would prevent the respondent company from dissipating more of their assets before the petitioners got their claim in; and that, if the respondents had any assets, the petitioners proposed to take all the proper legal steps to see that they went in satisfaction of the petitioners' claims, and not in satisfaction of any claims created subsequently to theirs.

The petition was heard before Sargant J. on May 22, 1917.

Tomlin, K.C., and *J. W. Holmes*, for the petitioners. An action by the respondents against the petitioners was dismissed with costs, and the costs payable under the judgment to the petitioners amount to over 65,000*l.* By s. 129 of the Companies (Consolidation) Act, 1908, one of the grounds for winding up a company is that "the company is unable to pay its debts." And by s. 130 a company is to be "deemed to be unable to pay its debts" if, amongst other things, "a creditor . . . . to whom the company is indebted in a sum exceeding 50*l.* then due has served on the company" a demand requiring payment, "and the company has for three weeks thereafter neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor." The statutory demand has been served, and has not been complied with for over three weeks, and a petition for a compulsory winding up has been presented. The petitioners are not only creditors but judgment creditors, and have therefore established their debt. As between himself and a company owing him money a creditor is entitled ex debito justitiae to a winding up order: Buckley on Companies, 9th ed. p. 300. And when a valid debt is established, the Court has no discretion, and ordinarily speaking it is its duty to direct a winding up: *Bowes* v. *Hope Mutual Life Assurance Co.* (1) It is true that an appeal has been lodged against the judgment, but that is not a ground, per se, for refusing to make a winding up order. The appeal itself does not stay execution on the judgment, and no application to stay execution has been made either to Eve J. or to the Court of Appeal. A search at the office of the Registrar of Joint Stock Companies has revealed to us that after the date of the notice of appeal and on the day when the taxing Master's certificate was obtained the respondents gave a charge on a large portion of their assets to secure sums not exceeding 30,000*l.* It is admitted that the money is being raised to provide funds for prosecuting the appeal. Part of the assets of the company is also mortgaged to a bank for 15,000*l.* The effect of dismissing the petition, or even ordering it to stand over, would be exercising a jurisdiction to stay execution which is only vested in Eve J. or the Court of Appeal. There is no reported decision precisely in point, but an unreported decision of the Court of Appeal is applicable and binding on this Court. In an action of *Wyler and the Ibo and Nyassa Corporation, Ld.* v. *Lewis and Marks* (2) the plaintiffs obtained judgment in a Court of first instance. On appeal the judgment was reversed and the plaintiffs were ordered to pay the costs of the litigation. On the judgment for the costs the defendants presented a winding up petition against the corporation. Neville J. refused to make a winding up order on the ground that an appeal was pending from the Court of Appeal to the House of Lords, and ordered the petition to stand over until the appeal to the House of Lords should have been heard. The Court of Appeal, however, made a winding up order, although other creditors and shareholders of the corporation opposed the making of the order. In the present case, that of a creditors' petition, the opposition of creditors who are also shareholders may be disregarded. Some, at least, of the creditors opposing the petition are secured creditors, and their voice is not more powerful than that of the shareholders. The respondents may rely on s. 5, sub-s. 4, of the Bankruptcy Act, 1914, as to staying or dismissing a bankruptcy petition where an appeal is pending from a judgment, but that is only a re-enactment of s. 7, sub-s. 4, of the Bankruptcy Act, 1883. There is no corresponding provision in the Companies (Consolidation) Act, 1908, and although between 1883 and 1908 the Legislature passed the Companies (Winding up) Act, 1890, and other Acts relating to companies, none of the Acts contained any provision applying the bankruptcy law in this respect to the winding up of companies, although certain bankruptcy rules as to other matters were applied to the winding up of companies. The section has no application in the winding up of companies. The case of the petitioners is strengthened by the fact that assets of the respondents on which they rely for payment are being applied to raise funds to fight the petitioners on the appeal.

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(1) (1865) 11 H. L. C. 389.

(2) Unreported.

Sir John Simon, K.C., and *W. E. Vernon* (*Gore-Browne, K.C.*, with them), for the respondents. The Court, in its discretion, ought to dismiss the petition—of course without prejudice to the petitioners' right to base a petition hereafter, in case of need, upon any materials which are now referred to. No application has been made to the Court of Appeal for an order on the respondents to give security for the costs of the appeal, which is the normal way in which a respondent is protected.

[SARGANT J. Only as regards the costs of the appeal.]

After a day had been fixed, by arrangement between counsel, for the hearing of the appeal the petitioners filed their petition, ostensibly for a winding up order but really for the indirect purpose of preventing the respondents from prosecuting their appeal.

[SARGANT J. But before that the statutory notice had been given.]

The period of three weeks for complying with it expired the day before the application was made to fix the date for hearing the appeal. The observations of the chairman at the meeting of the petitioning company, after the petition had been presented, show clearly that the object of it was to hamper, in fact hamstring, the appeal. If a winding up order is made there must be a liquidator, in whose appointment the petitioners will have a voice, and it may be a controlling voice. The liquidator, whether he is the official receiver or not, will have to go into the matter de novo ; and moreover those professionally concerned for the respondent company cannot be expected to undertake the liability of the appeal if there is a probability of an order being made in the future which will relate back to the hearing of the petition and invalidate intermediate transactions. Sect. 5, sub-s. 4, of the Bankruptcy Act, 1914, provides that "when the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, or sum ordered to be paid, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment or order." The reason why an exactly similar provision is not to be found in the Companies (Consolidation) Act, 1908, is that s. 141, sub-s. 1, of that Act is in general terms, and empowers the Court, on the hearing of the petition, to dismiss it, "or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it deems just." Where a petition is presented, ostensibly for a winding up order, but really for another purpose, such as putting pressure on a company, the Court has an inherent jurisdiction to prevent such an abuse of process by restraining the advertisement of the petition and staying all proceedings on it: *In re A Company.* (1) What the Legislature recognizes as being right in the case of a bankruptcy notice to an individual seems to be right in the case of a statutory demand to a company. Costs stand on a different footing from that of a debt arising from an ordinary contract. For instance, no debt in respect of the costs exists before the litigation. The costs come into existence in consequence of the litigation, but the result of the first stage of the litigation is subject to appeal. In the *Ibo and Nyassa Case* (2) there was a second appellant, and the winding up of the corporation would not and did not prevent the appeal to the House of Lords from being prosecuted.

Hon. Frank Russell, K.C., and *G. R. Northcote* (for *J. N. Daynes*, serving with His Majesty's Forces), for creditors partly unsecured and partly secured, and *J. F. W. Galbraith*, for secured creditors, also opposed the petition.

Tomlin, K.C., in reply, referred to Buckley on Companies, 9th ed. p. 302, and *In re Anglo-Bavarian Steel Ball Co.* (3), and said that the respondents were willing, if the winding up order was made, to leave the winding up in the hands of the official receiver as liquidator, to leave it to him to determine whether the appeal

(1) [1894] 2 Ch. 349.
(2) Unreported.
(3) [1899] W. N. 80.

should be prosecuted or not, and that the winding up order should lie in the office for ten days and not be operative if within that period security to the satisfaction of the registrar was given for the amount of the petitioners' debt.

SARGANT J. (after stating the facts). The result is that the petitioners, as judgment creditors for this very large sum, are prima facie entitled ex debito justitiae to a winding up order, and it seems to me to be impossible to displace that prima facie position without the very strongest proof that the petition is being improperly made use of for some ulterior motive. Sir John Simon, for the respondents, has said that the speech of the chairman at the meeting of the petitioning company in itself discloses an ulterior motive at that time, and shows that the petitioners are not presenting this petition bona fide in order to obtain payment of the sum owing to them, but that it is presented for the purpose of stifling the appeal.

I am not able to draw from the passages quoted from the chairman's speech the very sweeping inference which Sir John Simon asks me to draw. I think the chairman merely pointed out that steps were being taken by the respondent company under which the petitioning company might lose the fruits of their judgment, and that proceedings were being taken which would prevent that result from happening. I have yet to learn that judgment creditors who are entitled to be paid a judgment debt are to have evil motives attributed to them, or are to be deprived of their rights, because they are seeking to enforce those rights before the assets to which they look are mortgaged or charged in such a way as to deprive them of the legitimate expectation of being paid. But then it is said: "Well, at any rate the result of this petition, whatever the motive is, must be to hamper the prosecution of the appeal, and therefore it would be unfair to make a winding up order." And the argument goes to this length, that the Court should not merely decline to make a winding up order now, and should not merely postpone the hearing of the petition, but should actually dismiss the petition of the judgment creditors, because, while the petition is on the file, some difficulties will be experienced by the respondents to the petition in prosecuting their appeal. The argument is such a bold one that it answers itself, for it really comes to this, that, if an unsuccessful

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litigant happens to be a limited company and intends to appeal, that litigant practically is discharged from the necessity which litigants are under in such a state of things, of applying to the Court of first instance or to the Court of Appeal to stay execution on the judgment, because the respondents to the petition can always say that the necessary effect of the enforcement of the judgment by execution in the shape of a winding up order must be to hamper the appeal, and therefore no such order must be made and the petition must actually be dismissed for fear of those consequences. In the first place, it seems to me that, even if a winding up order is made, the consequences are not such as the respondents endeavour to make out. It is common practice for companies in liquidation to pursue litigation, either by way of appeal or otherwise. The Court having the conduct of the winding up can look into the subject-matter of the appeal or other proceedings, and I am not sure that there are not sometimes advantages in having the assistance of the Court in considering the proper steps to be taken. At any rate, I am not frightened by the suggestion that the effect of a winding up order would be to deprive the respondents in any real sense of any legitimate opportunity of appealing. And further than that, counsel has, on behalf of the petitioners, assented to leaving the winding up in the hands of the official receiver as liquidator, and is willing to undertake that the petitioners will not, while the appeal is pending, attempt to secure the nomination of any liquidator other than the official receiver.

There is no reported authority on the point before me, but my attention has been drawn to a case in which Mr. Holmes was engaged, *Wyler and the Ibo and Nyassa Corporation* v. *Lewis and Marks* (1), another celebrated litigation as regards length and cost. In that case the plaintiffs had been successful in the Court of first instance, but had failed in the Court of Appeal and been ordered to pay a large sum for costs. They presented an appeal from that judgment to the House of Lords, and while that appeal was pending a petition was presented, in respect of the costs, to wind up the plaintiff corporation. The petition was opposed by the corporation and creditors, and was heard by Neville J., who thought that the petition should not be dismissed—I do not know whether anybody had the courage to ask for its dismissal—but that it should stand over. The Court of Appeal, however, apparently took the view that the petitioners were entitled to their order ex debito justitiae, and accordingly made a winding up order. That is a precedent, in substance, for the order I propose to make, though not for all the details of that order, and I feel bound to follow it.

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(1) Unreported.

It has been said, on behalf of the respondents, that some light is thrown on the matter by s. 5, sub-s. 4, of the Bankruptcy Act, 1914, which repeats a similar enactment in the Bankruptcy Act, 1883, and is as follows: " When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, or sum ordered to be paid, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment or order." It is said that that provision recognizes the importance of a pending appeal as a ground for staying or dismissing a petition, and that the same considerations are applicable in the case of a petition for the winding up of a company. In my judgment, that provision is all in favour of the petitioners, because it seems to me to empower the Court in bankruptcy cases to take into consideration a circumstance which, apart from the statutory provision, the Court might not have been entitled to rely upon. It is noticeable that, although that provision, or a similar provision, has been in the bankruptcy legislation ever since the year 1883, no such provision has been introduced into the legislation as to winding up companies, although in certain other respects the rules in bankruptcy have been applied in the winding up of companies.

In my judgment, therefore, the petitioners are entitled as a matter of right to a winding up order, and, if I were not to make it, I should practically be doing what Eve J. or the Court of Appeal ought to have been asked to do, if the respondents so desired—namely, to stay execution on the judgment pending the appeal. Sir John Simon has, however, suggested that the respondents may at an early stage be in a position to provide security, to the satisfaction of the registrar, for this debt, and I think I should give them the opportunity of doing so. Accordingly I shall make the usual order for the winding up of the respondent company; but that order must lie in the office till the end of next week, and if in the meantime the respondents give security, to the satisfaction of the registrar, for the payment of the 65,000*l.* odd due to the petitioners for costs, the order will not be given out or drawn up, and there will be substituted an order dismissing the petition, with costs to be paid by the respondents.

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The respondent company appealed, and the same counsel appeared for the parties. The appeal came on for hearing on May 25, 1917.

After some argument for the appellants, an arrangement, suggested by the Court, was agreed to.

SWINFEN EADY L.J. Having regard to the course that this appeal has taken, it is not necessary to deliver any formal judgment, because an alternative to what was proposed, and indeed required, by Sargant J. has been acquiesced in by the petitioners. So far as the case has been heard—it has not been fully heard because of the arrangement arrived at—I see no ground for differing from the judgment which Sargant J. pronounced. He made a winding up order against the appellant company providing that, in the event of security being given to the satisfaction of the registrar for the petitioners' debt, which is for a sum of over 65,000*l.*, on or before the end of next week, then the petition was to be dismissed; otherwise there was to be the ordinary winding up order. If the petition was dismissed the respondents were to pay the costs, but if there was a winding up order it was to contain the usual direction as to costs. The respondents to the petition have appealed from the judgment of Sargant J. and having regard to the arrangement suggested by the Court and agreed to by the parties, the matter stands in this way: If the respondents give the security required by Sargant J. within the time limited by him, the petition is dismissed, the costs being paid by the respondents. But, as an alternative to the terms imposed by Sargant J., the respondents are given an opportunity in this form: In lieu of the respondents giving security to the satisfaction of the registrar they may give a security on all their assets for that debt, subject as to such assets as are already specifically charged to the specific charges, but free from the charge created after the judgment of Eve J. (the chargees in respect of that charge joining in

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AMALGAMATED PROPERTIES OF RHODESIA (1913), LIMITED, *In re.*

Swinfen Eady L.J.

the postponement of their charge). The charge so to be given to the petitioners will be for the amount of their debt, which, I assume, will carry interest at 4 per cent., and also for security for the taxed costs of the respondents on the appeal, not exceeding a sum of 10,000*l.*, if and so far as the appellants shall be ordered by the Court of Appeal to pay those costs. One or other of the alternatives must be complied with within the time previously limited, that is to say, on or before Saturday week. In the event of either alternative being complied with, the petition is dismissed, the respondents paying the costs of the petition. If neither alternative is complied with in the time limited, then the winding up order stands. In any case the respondents must pay the costs of this appeal from the judgment of Sargant J.

BANKES and WARRINGTON L.JJ. concurred.

Solicitors for petitioners: *Holmes, Son & Pott.*

Solicitors for respondents to the petition: *Churchill, Smallman & Co.*

Solicitors for creditors opposing the petition: *Spyer & Sons; Haslam & Sanders.*

G. A. S.

NEVILLE J.

1917

June 7.

In re MAY.

EGGAR *v.* MAY.

[1917 M. 337.]

Will—Legacy—Forfeiture if Legatee a Roman Catholic—Infant Legatee.

A testatrix bequeathed 5000*l.* upon trusts to invest and to accumulate the income until her nephew M. should attain the age of twenty-four years, and after he should have attained that age to pay the income of the 5000*l.* and of the accumulations to him during his life, "provided he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death until he shall after my death become a Roman Catholic," with a gift over on the happening of any of the aforesaid events or of his death, whichever should first happen. At the death of the testatrix M. was about eleven years of age and had been baptized in the Roman Catholic faith, and was being brought up in that faith by his father, who was a Roman Catholic:—

Held, that the infant was not a Roman Catholic at the death of the testatrix within the meaning of the will, that the testatrix meant him to have an opportunity of making his choice in the matter, and that opportunity he would have after attaining his age of twenty-one years and before the legacy became payable.

ADJOURNED SUMMONS.

The plaintiffs were the executors and the general trustees of the will, dated February 7, 1914, of Alice Mary May, spinster, who died in July, 1915.

By clause 7 of her will the testatrix bequeathed the sum of 5000*l.* free of all duties to her general trustees upon trust to invest as therein mentioned, and "upon further trust that my general trustees shall until my nephew the said Michael May shall attain the age of twenty-four years or the trusts in his favour hereinafter in this clause contained shall become incapable of taking effect accumulate the income of the said sum of 5000*l.* and the investments from time to time representing the same at compound interest and the resulting income thereof in any of the investments hereinbefore mentioned in augmentation and so as to follow the destination of the fund from which the same shall have proceeded and shall pay the income of the said sum of 5000*l.* and of any accumulations made as hereinbefore directed and the investments for the time being representing the same respectively (hereinafter together called ' Michael's settled legacy ') after the said Michael May shall have attained the age of twenty-four years to the said Michael May during his life provided that he shall not be a Roman Catholic at my death or being a Roman Catholic at my death shall cease to be a Roman Catholic before the expiration of twelve calendar months after my death until he shall after my death become a Roman Catholic or until he does or attempts to do or suffers any act or thing or until any event happens whereby if the same income were payable to him absolutely for his life he would be deprived of his right to receive the same or any part thereof in any of which cases as well as on the death of the said Michael May whichever first happens the trusts hereinbefore declared for payment to him of the income of Michael's settled legacy shall determine." Then followed (clause 8 of the will) a gift over of Michael's settled legacy, on the determination of the trusts thereof thereinbefore declared, to the Chancellor and Vice-Chancellor of Oxford University upon certain trusts.

By clause 9 of her will the testatrix bequeathed a further sum of 5000*l.* to her general trustees in trust for her nephew Gilbert May on identically the same terms and conditions as those declared concerning Michael's settled legacy, and with a like gift over to the Chancellor and Vice-Chancellor of Oxford University upon certain trusts.

At the death of the testatrix her nephews Michael and Gilbert May were respectively eleven and six years of age. They were the children of William May, who was a Roman Catholic, and both in early infancy had been baptized according to the rites of the Roman Catholic Church and were being brought up by their father in that faith. Under these circumstances the plaintiffs felt a difficulty as to the operation of clauses 7 and 9 of the will, and issued a summons to determine whether in the events which had happened both or either of the legacies of 5000*l.* or the investments representing the same became at the end of twelve calendar months from the testatrix's death payable and transferable to the Chancellor and Vice-Chancellor of Oxford University.

The case was argued on clause 7 of the will.

Ashworth James, for the plaintiffs.

Jenkins, K.C., and *H. B. Vaisey*, for the infants. There is no direct authority on the point now before the Court. It is not disputed that a father has the right to direct in what religion his children shall be brought up subject to this—that if the father in any way forfeits or waives his right the Court will decide what is for the benefit of the infant, but is always very reluctant to interfere on account of mere pecuniary benefit to the child: Simpson on Infants, 3rd ed. p. 114. Sometimes the Court interviews the child: *In re W.* (1); but we do not ask the Court to do so in this case.

[Neville J. I certainly should not do so. The real question here is, what did the testatrix mean ?]

It is submitted the testatrix did not intend that her gift should depend upon the decision of the father of her nephew during his infancy. The legacy is not payable until he attains the age of twenty-four years, and she contemplates an act of volition on his part. He must elect whether or not he will repudiate the Roman Catholic religion and accept the legacy, but an infant cannot elect. She assumes that he may be twenty-four at her death and must then elect, or that after attaining twenty-one there will be an interval of three years during which time he may elect. Clause 8 of the will does not carry the matter any further. It is submitted that there has been no forfeiture of the legacy.

Talbot, K.C., and *Whinney*, for the Chancellor and Vice-Chancellor of Oxford University. As the University authorities are trustees under the gift over, it is their duty to take the opinion of the Court on the will. A father has an absolute right to decide what religious education his children shall receive, and the rule is not affected by the Guardianship of Infants Act, 1888: *In re Scanlan.* (2) The real question is whether these legatees were Roman Catholics at the death of the testatrix. It is for them to show that they were not, or that, being Roman Catholics, they have ceased to be so. In ordinary language a Roman Catholic is a person who is a member of the Roman Catholic Church, and it only confuses the issue to introduce the question of the religious belief of the person. These infants had been baptized and received into the Roman Catholic Church, their religion is their father's religion, and they were and are Roman Catholics within the meaning of the will at the death of the testatrix. She knew their ages, and the proviso against being a Roman Catholic is a condition precedent, and incapacitates them from receiving the legacy.

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(1) [1907] 2 Ch. 557.

(2) (1888) 40 Ch. D. 200.

NEVILLE J. This is a case not without difficulty. It is the case of a legacy given to an infant which he is not to enjoy until he is twenty-four years of age in any case; but obviously the testatrix does not intend him to enjoy it at all if he is a member of the Roman Catholic Church, and she has repeatedly indicated her intention to that effect. But by the terms of the will he is given a locus poenitentiae, should he be a Roman Catholic at the date of the testatrix's death, to repudiate that Church—I suppose she means by that "cease to be a Roman Catholic"—within one year of her death and then he shall be entitled to the legacy. Even then, should he at any time afterwards become a Roman Catholic he ceases to be entitled to the payment of the income; but with that part of the directions contained in the will I have nothing to do to-day, because the legatee is a young child, and many years must elapse before he attains twenty-four and becomes entitled, if at all, to the payment of the income.

The question that arises now is, are the accumulations of the income directed to be made to continue, or has the event happened on which the infant is incapacitated from taking the legacy? In other words, the question is, as it has been truly said, was he within the meaning of the will a Roman Catholic at the date of the testatrix's death? It is said he was, because his father had had him baptized in the Roman Catholic Church and desires him to be educated and brought up a Roman Catholic, and so far as his natural guardian can make him a Roman Catholic he has undoubtedly done so. But is that the view of the Court? Supposing that in the testatrix's mind it was to be a question of volition on the part of the legatee—and I think the reference to repudiating the Roman Catholic religion within a year of her death indicates that that was so—is it possible to say that that volition could be exercised, either to make him a Roman Catholic or to unmake him a Roman Catholic, so long as in the eye of our law he has not reached years of discretion and is therefore unable to decide for himself or to make an election

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of any kind? It appears to me that that cannot be so. I do not know, not being myself a member of the Roman Catholic Church, how early an infant is baptized, but I imagine he may be baptized shortly after birth, and, if the present argument were to prevail, the legacy failed the moment the infant had been baptized. The result would be that at the age of a few days possibly he would have been incapacitated to receive the legacy except that they might have to wait for a year to see whether when he was a year old he repudiated the Church in which he had been baptized. I do not think the testatrix meant that. I think if she meant to impose an obligation on the father in regard to what she considered to be an undesirable religion she would have said the legacy was not to be paid if the father brought up the infant in the Roman Catholic faith. She does not do that, but says if the legatee is a Roman Catholic and does not cease to be a Roman Catholic within a year the legacy is to fail. The result to my mind is that during the time until he reaches the age of twenty-one he cannot in the sense meant in the will be said to be either a Roman Catholic or not a Roman Catholic. In the eyes of this Court he cannot determine what his religion shall be until he has reached years of discretion. It is quite true that, if you asked a priest of the Roman Catholic Church, he would unhesitatingly tell you the child was a Roman Catholic, but I do not think the Court has anything to do with that. The view of the Court is not the view of the priest. Having come to the conclusion that the testatrix meant that there was to be a choice on the part of the legatee, I think the legatee must have an opportunity of exercising that choice. That opportunity will be his if, after attaining twenty-one and as he approaches twenty-four, he can consider whether he will be a Roman Catholic or not. All that I decide now is that by being baptized in the Roman Catholic Church he has not forfeited his legacy. The accumulations therefore will continue, and the question asked by the summons will be answered in the negative.

Solicitors for plaintiffs: *Thomas Eggar & Co.*
Solicitors for defendants: *Slaughter & May; Philpot & Co.*

H. L. F.

In re SUAREZ.

SUAREZ *v.* SUAREZ.

[1914 S. 278.]

EVE J.
1917
March 26;
May 23.

International Law—Ambassador—Privilege — Waiver — Administration Action—Submission to Jurisdiction—Judgment for Payment into Court—Writ of Sequestration—Leave to issue—Diplomatic Privileges Act, 1708 (7 *Anne, c.* 12), *s.* 3—*Courts (Emergency Powers) Acts,* 1914-1916.

An Ambassador in this country is entitled to complete immunity from the jurisdiction of the local Courts except in cases in which he submits to or invites the jurisdiction.

Where an Ambassador, sued as administrator to an intestate's estate, has submitted to the jurisdiction down to judgment, and an order has been made determining his liability to pay money into Court, he can still assert his immunity from process by way of execution and set up the Diplomatic Privileges Act, 1708, as an answer to an application for leave to issue execution against his personal property.

Taylor v. *Best* (1854) 14 C. B. 487 discussed.

In re Republic of Bolivia Exploration Syndicate [1914] 1 Ch. 139 followed.

ADJOURNED SUMMONS.

The plaintiff, Nicholas Suarez, claimed to be one of the next of kin of Francisco Suarez, who died intestate on February 10, 1897. The defendant, Pedro Suarez, was also one of the next of kin of Francisco Suarez and the person to whom letters of administration to the estate of the intestate were granted on February 23, 1900.

Pedro Suarez was Envoy Extraordinary and Minister Plenipotentiary for the Republic of Bolivia duly accredited to the Court of St. James's, and also Consul-General in London for the said republic.

The estate of Francisco Suarez had been partially administered in a creditor's action in which the usual judgment was pronounced in July, 1897, but it was ultimately stayed by an order of February 8, 1902, when the creditors had been paid in full.

The present action, which was a beneficiary's action against the defendant as administrator, was commenced in January, 1914, by originating summons, and when the summons came on to be heard by Joyce J. in July, 1914, and it transpired that the defendant still remained when this application was heard the Minister accredited to this country by the Republic of Bolivia, the learned judge declined to make any order thereon until satisfied that the defendant had personally instructed counsel that he was willing to submit to the jurisdiction and to waive his privilege as a diplomatic agent. These instructions were obtained and an order made on July 14, 1914, but this order was subsequently discharged by the Court of Appeal, and the order on which the action proceeded was an order of that Court dated July 30, 1914.

Under various subsequent orders in the action cash and securities to a considerable amount belonging to the intestate's estate had been brought into Court, and by an order of January 30, 1917, the defendant was ordered to lodge in Court a further sum of 16,269*l.* 4*s.* 9*d.*, balance of a sum of 18,769*l.* 4*s.* 9*d.* after deducting 2500*l.* then already paid in, with which the defendant on the conclusion of his cross-examination before Eve J. submitted to be surcharged on his accounts as administrator. This order had not been obeyed.

On March 10, 1917, a summons was issued by the plaintiff under the Courts (Emergency Powers) Acts, 1914-1916, for leave to proceed to execution, or otherwise for the enforcement of payment of the sum of 16,269*l.* 4*s.* 9*d.* so directed to be paid into Court by the defendant Pedro Suarez, and that the plaintiff might be at liberty to issue a writ of sequestration against the property and effects of the defendant.

There was evidence that the defendant had been granted three months' leave of absence from his post in order to obtain certain documents, and that he started for Bolivia on March 8, 1917.

Maugham, K.C., and *Beebee* (for *Cyril Hartree*, serving with His Majesty's Forces), for the plaintiff. The defendant has waived his privilege as a Minister Plenipotentiary by appearing upon the proceedings, and has done so for good and all. The plaintiff is willing to give an undertaking not to enter or attempt to enter upon the premises of the Bolivian Legation, and not to seize any of the emoluments of the defendant or any of the goods and chattels necessary for his personal comfort and dignity as such Minister. But the plaintiff is entitled to seize investments or real property, if any, or flocks of sheep or cattle belonging to the defendant in order to satisfy the judgment. The law with regard to the immunity of Ambassadors from writs and processes is declared by the Diplomatic Privileges Act, 1708 (7 Anne, c. 12) (1), passed in consequence of the Russian Ambassador in London having been taken from his coach and imprisoned by a private suitor, but s. 3 of that Act is merely declaratory of the common law. *Taylor* v. *Best* (2) is a leading case upon the right of Ambassadors, and there privilege had been waived by a submission to the jurisdiction of the Court. Many text-writers were cited in the argument of the case. In his judgment Maule J. refers to the statute of Anne, and suggests that the privilege will not extend to the property of an Ambassador which is not necessary for his personal comfort and state. That case, however, does not decide the question in favour of the plaintiff here, but it establishes that privilege can be waived. It would be extraordinary if that could be done and then when an order had been made against the Minister he could defy the Court to touch his property. *Magdalena Steam Navigation Co.* v. *Martin* (3) does not decide anything against the plaintiff's contention. Privilege may be waived either by actual waiver or by engaging in commerce. A Sovereign may also submit to the jurisdiction—

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(1) By the Diplomatic Privileges Act, 1708, it is provided, s. 3: " . . . . That all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other publick minister of any foreign prince or state, authorized and received as such by her Majesty, her heirs or successors, or the domestick or domestick servant of any such ambassador, or other publick minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever."

By s. 4 it is provided " that in case any person or persons shall presume to sue forth or prosecute any such writ or process, such person, and persons, and all attornies and solicitors prosecuting and soliciting in such case, and all officers executing any such writ or process, being thereof convicted . . . . shall be deemed violaters of the laws of nations, and disturbers of the publick repose, and shall suffer such pains, penalties, and corporal punishment, as the lord chancellor, lord keeper, and chief justices, or any two of them shall judge fit to be imposed and inflicted."

(2) 14 C. B. 487, 524.

(3) (1859) 2 E. & E. 94.

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Mighell v. *Sultan of Johore* (1)—and, a fortiori, an Ambassador. In *Parkinson* v. *Potter* (2) it was held that payment of rates was not enforceable against an attaché. Another case of waiver of privilege is the recent case before Astbury J. of *In re Republic of Bolivia Exploration Syndicate* (3), where he refers to *Taylor* v. *Best* (4) and the statute of Anne as only explanatory of the law of England. But the learned judge's attention was not called to the distinction between what can be waived and what cannot be waived. [Reference was also made to *Musurus Bey* v. *Gadban* (5), *The Jassy* (6), *The Parlement Belge* (7), and Westlake on Private International Law, 5th ed. pp. 246, 271-279.]

Greenland, for the defendant. There is no jurisdiction to issue the writ of execution in this country. The statute of Anne is explicit, and s. 3 totally prohibits the issue of any such writs or processes under pain of corporal punishment. Any sequestrator would be placed in a position of great difficulty in deciding what was necessary for the comfort and dignity of a Minister. The Act, in fact, creates a criminal offence. It is doubtful whether an Ambassador is strictly entitled to waive anything : *In re Republic of Bolivia Exploration Syndicate.* (3)

[EVE J. What is the effect of waiver ?]

The person waiving his privilege can have the matter investigated by the Court, but the Court has no real jurisdiction over him. There are only two cases of waiver in the books—that before Astbury J. (3) and *Taylor* v. *Best.* (4) As regards execution there can be no waiver at all. There is no statutory privilege for a Sovereign, and there is no case where a judgment made against an Ambassador has been executed by writ. It is purely a question of law under the statute of Anne.

Maugham, K.C., in reply. The statute of Anne was not meant to abolish the right of waiver or to alter it. It was so construed in the cases relating to Ambassador's servants, whose privilege of freedom from arrest is the privilege of the Ambassador : *Fisher* v. *Begrez* (8);

(1) [1894] 1 Q. B. 149.
(2) (1885) 16 Q. B. D. 153.
(3) [1914] 1 Ch. 139.
(4) 14 C. B. 487, 524.
(5) [1894] 2 Q. B. 352.
(6) [1906] P. 270.
(7) (1880) 5 P. D. 197.
(8) (1832) 1 C. & M. 117 ; (1833) 2 C. & M. 240.

Novello v. *Toogood.* (1) Movable goods unconnected with the personal comfort or dignity of the Ambassador may be seized.

The dictum of Astbury J. on the power to waive privilege is against us, but that point was never really argued before him, and there is no express authority on either side.

Cur. adv. vult.

May 23. Eve J., after stating the facts as to the orders which had been made, continued: The defendant has wholly failed to comply with the order of January 30, 1917, and in opposition to an application by the plaintiff under the Courts (Emergency Powers) Acts, 1914-1916, for leave to enforce it he has raised the question whether, notwithstanding his submission to the jurisdiction, any writ of execution can be sued out or issued whereby his goods, chattels, or effects can be seized or attached.

In support of his contention that any such writ is null and void the defendant relies on s. 3 of the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), whereby it is enacted "that all writs and processes . . . . sued forth or prosecuted, whereby" (inter alia) "the goods or chattels of any ambassador or other publick minister of any foreign prince or state" accredited to and received by the Sovereign of this country "may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever."

To this the plaintiff answers that there are limits to this rule of exemption—it does not extend to real estate; and he maintains, further, that personal property, not being emoluments of the office, or used or necessary for the exercise of the functions of an Ambassador or for the maintenance of the personal dignity or comfort of the Ambassador, does not fall within it, but is subject to the local jurisdiction. He presses, therefore, for leave to issue execution against such personal property, and asks for an order which would in terms limit his right of levying to such property.

No decided authority is cited to support the further exception to the rule for which the plaintiff contends, but reliance is placed on several passages tending to suggest the existence of such exception quoted from the jurists in the report of *Taylor* v. *Best* (2), and on some

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(1) (1823) 1 B. & C. 554, 562.

(2) 14 C. B. 487, 524.

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observations made in the judgments in that case, more particularly in that of Maule J.; and it has been forcibly argued that, the statute of Anne having been held to be declaratory of the common law (see *Viveash* v. *Becker* (1)), and s. 3 thereof having further been held to extend to all writs and processes and not to be confined to writs of execution (*Musurus Bey* v. *Gadban* (2)), it is quite illogical to treat the writ of summons as being neither null nor void in a case where the Ambassador submits to the jurisdiction and allows the action to proceed without asserting his privilege, and at the same time to hold that the statute absolutely prohibits the procedure which may be the only means of making the judgment in such action productive of any result.

In dealing with this argument it is, I think, necessary to appreciate exactly what the Court had to decide in *Taylor* v. *Best*. (3) It was an application by the person entitled to claim privilege to have the proceedings stayed as against him. But he had obtained orders giving him time to plead, he had pleaded, and he had applied for a rule for a special jury and had not raised the question of privilege on any of these occasions. In these circumstances the only question which the Court was called upon to determine was whether the application—made after notice of trial had been served—ought to be entertained, or whether it was not altogether too late, and they held the applicant estopped by his conduct from succeeding in the application.

The doubt raised by the elaborate arguments presented to the Court—founded largely upon extracts from the jurists—and by the judicial observations to which I have alluded, is accurately stated at the conclusion of the head-note of the report in 14 C. B. in these terms " Quære, Whether the privilege of an Ambassador or foreign Minister extends to prevent his being sued in the courts of this country, or only to protect him from process which may affect the sanctity of his person, or his comfort and dignity."

It is to be observed that that question is not identical with the one with which I have here to deal, although in a sense it may seem to cover the present position. In substance it raised a doubt whether the diplomatic privilege had any application at all to litigation arising out of transactions outside and unconnected with the defendant in his character as a diplomatist, and which in no way affected the sanctity of his person or involved risk to his official comfort or dignity, or to property of which he was possessed by virtue of his office. It involved, no doubt, a separation of his private personality from his diplomatic character, with a corresponding severance of his personal effects and property from the effects and property belonging to him by virtue of his office; but, assuming such a separation possible, it would at first sight seem only consistent that, if there was such an unprotected area outside the privileged area, the right to gather the fruits of litigation in such unprotected area by process of execution should be recognized and upheld. But even in *Taylor* v. *Best* (1) the Court apparently drew a distinction between proceedings up to judgment and steps to enforce the judgment. Jervis C.J. towards the end of his judgment says: "If any ca. sa. or fi. fa. were issued against him upon the judgment, the statute of Anne would have applied, and the Court might have been called upon to interfere to prevent its being put in force against him." I agree that it is not quite clear whether that observation extends to cases where the Ambassador has appeared and submitted to the jurisdiction or is confined to the case with which the Chief Justice was dealing in the immediately preceding sentence, namely, that of a non-appearing defendant who has allowed judgment to go against him by default.

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(1) (1814) 3 M. & S. 284, 292.

(2) [1894] 2 Q. B. 352.

(3) 14 C. B. 487.

But putting it mostly in favour of the applicant here, it comes to this, that the judgments in *Taylor* v. *Best* (1) left open the question propounded by Maule J.—"Whether an Ambassador or public Minister can be brought into Court against his will, by process not immediately affecting either his person or his property, and have his rights and liabilities ascertained and determined"; and when that question was answered by an emphatic negative in the case of *Magdalena Steam Navigation Co.* v. *Martin* (2) the matter was really concluded, and thereafter *Taylor* v. *Best* (1) stands only as an authority for what it actually decided, and can no longer usefully be resorted to for any dicta or expressions of opinion raising doubts as to what the law really is. The law as laid down in the *Magdalena Case* (2) has been reaffirmed without qualification by the Court of Appeal in *The Parlement Belge* (1) and in *Mighell* v. *Sultan of Johore* (2), and there can now no longer be any doubt that in this country an Ambassador is entitled to complete immunity from the jurisdiction of the local Courts except in cases in which he submits to or invites the jurisdiction. In the recent case of *In re Republic of Bolivia Exploration Syndicate* (3) Astbury J. went so far as to express doubts whether the privilege can be waived at all by a Minister—at any rate, without the permission of his own Government. I do not propose to examine whether these doubts are well founded, but, as Mr. Dicey points out in a note on p. 199 of the 2nd edition of his Conflict of Laws, authority to confirm them is not wanting. On this occasion, however, I shall assume that the privilege was effectually waived down to the date of the order now sought to be enforced, and I do this the more readily because this action is in its nature an action primarily to recover property in the hands of the defendant in a fiduciary character as trustee for the intestate's next of kin, and property therefore to which the shelter of his exterritorial privilege would not extend: see Phillimore's International Law, 2nd ed. vol. ii. p. 217.

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(1) 14 C. B. 487, 523.

(2) 2 E. & E. 94.

This, then, brings me to the question whether an Ambassador submitting to the jurisdiction down to judgment, when judgment has been pronounced, or an order working out the judgment has been made determining his liability to pay, can then assert his immunity from process by way of execution and set up the statute of Anne as an answer to an application for leave to issue execution.

Astbury J. in the case I have last referred to is of opinion that he can (4); and to the same effect are statements to be found in Westlake's Private International Law, 5th ed. p. 279; in Pitt Cobbett's Cases and Opinions on International Law, 3rd ed. pt. i., pp. 296 and 297; and in Sir Ernest Satow's "Guide to Diplomatic Practice," which has been published since this case was argued, the proof sheets of which he was good enough to place at my disposal. In section 289 on p. 252, after stating as two of the exceptions to the rule of exemption from civil jurisdiction the cases (1.) where the Ambassador submits to the local jurisdiction and (2.) where he has chosen to bring an action, and referring to Hall's statement, International

(1) 5 P. D. 197.

(2) [1894] 1 Q. B. 149.

(3) [1914] 1 Ch. 139.

(4) [1914] 1 Ch. 157.

Law, 6th ed. p. 174, that if he acts as executor he must plead to suits brought against him in that capacity, the author proceeds: "The above statement is, however, rather too sweeping, inasmuch as, even if a judgment were obtained against a foreign diplomatist in a suit involving other than real property, it could not be executed."

There is, therefore, a consensus of opinion amongst text-writers, concurred in by Astbury J., that any writ of execution directed against personal property is null and void under the statute, and that it is immaterial that the Ambassador has up to that point in the action submitted to the jurisdiction, or even invoked it. The only authority cited in support of the opinion is the observation I have read at the end of the judgment of Jervis C.J. in *Taylor* v. *Best* (1), and, assuming that the learned Chief Justice intended it to apply to cases where the jurisdiction is submitted to, I respectfully doubt whether he had in his mind a case where the jurisdiction has been voluntarily invoked. That, however, is not the case I have to deal with here, but one in which there has been a submission to the jurisdiction for all purposes short of execution, and although the facts disclosed in the proceedings establish an unfortunate inability on the part of the respondent to discriminate between *meum* and *tuum* and would therefore compel me to make the order asked if I thought it would be effective, yet, in view of the unanimous interpretation put upon the statement of the Chief Justice by those who are experts in this difficult branch of the law and by my brother Astbury, and not overlooking the great practical difficulties which would present themselves to the officers charged with executing any writ in deciding what could and what could not be seized thereunder, I think the proper course is to make no order on the summons except that it do stand over generally, with liberty to restore in the event of the defendant ceasing to hold an office to which the immunity he asserts is attached.

Solicitors: *Darley, Cumberland & Co.; Nelson, Son & Plews.*

(1) 14 C. B. 487, 523.

G. M.

NEVILLE J.

1917

June 5.

In re SAILLARD.

PRATT *v.* GAMBLE. (1)

[1917 S. 556.]

Will—Direction to pay 200l. per Annum "free of all duties" to Solicitor-Trustee for Trouble in acting—Income Tax.

Testator directed payment of 200*l.* per annum "free of all duties" to a solicitor-trustee out of the income of his estate for and in respect of his trouble in acting as a trustee of his will, so long as he should continue to act as such trustee, and also in addition gave him power to charge and be paid for professional and other charges :—

Held, that the sum of 200*l.* was to be paid subject to and not free of income tax.

Wall v. *Wall* (1847) 15 Sim. 513 followed and applied.

Adjourned Summons.

The testator, P. P. R. Saillard, who died on February 15, 1916, by his will, dated December 2, 1915, appointed his daughter Emily Pratt, Algernon Edward Sydney, solicitor, and Henry Gilbert Cubitt his executors and trustees, and gave a number of specific bequests, pecuniary legacies, and annuities "free of all duties," and gave his residuary real and personal estate to his trustees upon trusts for sale and conversion and upon trust out of the moneys to arise therefrom to pay his funeral and testamentary expenses and debts and legacies and to make provision for the payment of the annuities, and to pay the duties on any legacies or annuities thereby bequeathed free of duties, and to invest the residue of the said moneys (thereinafter called the trust fund); and the testator declared that the trustees should during the lifetime of his widow hold the trust fund upon trust out of the annual income thereof to pay a number of annuities "free of all duties," and subject thereto upon the trusts therein declared, including a trust upon the death of his widow to purchase a number of annuities for the benefit of the persons therein named; and by clause 25 of his will the testator declared as follows:

"In addition to the ordinary power of indemnity and right to reimbursement given by law to trustees I direct that there shall be paid a sum of 200*l.* per annum free of all duties to the said Algernon Edward Sydney or any other trustee of this my will who shall be a solicitor as from my death out of the income for the time being of the trust premises for and in respect of his trouble in acting as a trustee of this my will so long as he shall continue to act as such trustee"; and also in addition that the said Algernon Edward Sydney and every other trustee of his will who should be a solicitor might act as solicitor to his estate and be entitled to charge for professional and other business.

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(1) Affirmed in C. A., July 19.

By a codicil to his will the testator provided that if Algernon Edward Sydney should die in his lifetime, or renounce probate or decline to act as trustee (which happened), John Gamble, solicitor, should be an executor or trustee in his place.

Legacy duty had been paid in respect of the annual sum of 200*l.* to which John Gamble so became entitled.

This was an originating summons taken out by the trustees (other than John Gamble) against John Gamble and persons interested in the residue as defendants, raising the question whether any and what income tax should be deducted by the trustees on payment of the sum of 200*l.* payable under clause 25 of the will to John Gamble.

Owen Thompson, for the summons.

J. H. Redman, for John Gamble. The expression "free of all duties" means that this sum is to be paid free of income tax. That income tax is strictly a "duty" appears from the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and the Income Tax Act, 1853 (16 & 17 Vict. c. 34), each of which is intituled "An Act for granting to Her Majesty duties on profits arising from property, professions, trades and offices," and in s. 1 of the Act of 1853 the expression used to describe the tax is "rates and duties." Sect. 2 of the same Act enacts that for the purpose of classifying and distinguishing the several properties, profits and gains for and in respect of which "the said duties" are granted, and for the purposes of assessing "such duties," the "said duties" shall be granted and made payable yearly for or in respect of the several properties, profits, and gains respectively described or comprised in the schedules to the Act. In s. 102 of the Act of 1842, dealing with annuities, the word "duty" is again used. Indeed, in the Acts of 1842 and 1853 the term "income tax" is never used to describe the tax. The description "income tax" occurs in the Customs and Inland Revenue Act, 1887 (50 & 51 Vict. c. 15), but the Act is intituled "An Act to grant certain duties of Customs and Inland Revenue, and to alter other duties, and to amend the laws relating to Inland Revenue," and the Act itself is divided into three parts, in which these duties are dealt with under the descriptions of "duties of customs," "stamp duties," and "duties of income tax." In the same way the Finance Act, 1894 (57 & 58 Vict. c. 30), bears a similar title and is divided into four parts, in which the duties are dealt with under the descriptions of "estate duty," "duty of custom," "duty of excise," and "duties of income tax." Similarly in the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 66, super-tax is described as "an additional duty of income tax," and so too is the additional income tax on securities which the Treasury are willing to purchase in the Finance Act, 1916 (6 & 7 Geo. 5, c. 24), s. 27. The word "duties" therefore in its primary meaning is clearly a generic term including income tax, and my contention accordingly is that the expression "free of all duties" prima facie includes income tax, and that it is for those who maintain the contrary to show something in the will to restrict the prima facie meaning. There appears to be no decided case on the exact point.

Wright Taylor, for persons interested in the residue. The fact that income tax is described as a "duty" in the Acts of Parliament which impose it has no real bearing on the question before the Court, which is what is the meaning of "duties" in a testamentary document. A "duty" is synonymous with "debitum," or a debt, and means in a will debts due to the Crown arising out of the death of the testator, and not a future and uncertain duty like income tax.

[NEVILLE J. referred to *Wall* v. *Wall* (1), where a gift by will of an annuity "clear of all taxes and deductions" was held subject to income tax.]

That case is strongly in my favour. *Gleadow* v. *Leetham* (2) is a decision to the same effect on the words "free of all deductions and abatements whatsoever." The authorities on the subject are collected in Dowell on Income Tax, 7th ed. p. 481, in a note to

(1) 15 Sim. 513.

(2) (1882) 22 Ch. D. 269.

s. 2 of the Income Tax Act, 1853, but do not appear to include any decision on the word "duties" in a will as applied to income tax. *Duncan* v. *Watts* (1) shows that there is no priority in the case of such a legacy as this, and *In re Pooley* (2) shows that it is mere bounty on the part of the testator.

NEVILLE J. In my opinion the point raised by this summons is really covered by the decision of Shadwell V.-C. in *Wall* v. *Wall.* (3) There is a little difference in the language of the two wills, because in that case the words were "clear of all taxes and deductions," while in the present case they are "free of all duties," but I think that the reasoning on which the Vice-Chancellor founded his decision is equally applicable to the case before me. The Vice-Chancellor said this: "I have looked at the 102nd section of the Property Tax Act, and it is quite plain, from the language of that section, that the thing that is given is the thing that is to pay the tax." I hold, therefore, that the annual sum of 200*l.* is given subject to and not free of income tax.

Solicitors: *Nye, Moreton & Clowes*; *J. Gamble.*

(1) (1852) 16 Beav. 204. (2) (1888) 40 Ch. D. 1.
(3) 15 Sim. 513, 520.

A. C.

C. A.
1917
March 23, 26;
May 11.

TINGLEY *v.* MÜLLER.

[1915 T. 1638.]

Trading with the Enemy—Vendor and Purchaser—Sale of Land—Irrevocable Power of Attorney given by German on Eve of Departure for Germany—Contract for Sale by Attorney—Validity—Payment of Sum to or for Benefit of Enemy—Contract for Benefit of Enemy—Trading with the Enemy Proclamation No. 2, *dated September* 9, 1914, *pars.* 3, 5—*Trading with the Enemy Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 87)—*Trading with the Enemy Amendment Act*, 1914 (5 *Geo.* 5, *c.* 12), *s.* 10—*Trading with the Enemy Amendment Act*, 1916 (5 *&* 6 *Geo.* 5, *c.* 105), *s.* 4.

An irrevocable power of attorney to sell land and give receipts for the purchase-money is not avoided by the donor of the power subsequently becoming an alien enemy.

The defendant, a German by birth but for many years resident in England, although never naturalized, being about to proceed to Germany, executed a power of attorney on May 20, 1915, by which he appointed his solicitor his attorney to sell his leasehold house and to execute such transfers and deeds as were necessary. The power of attorney was made irrevocable for twelve months. On May 26 the defendant obtained a Government permit from the police to travel to Tilbury with the object of embarking for Germany by way of Flushing, and started on that day. On June 2, 1915, the leasehold premises were sold to the plaintiff by public auction, and a deposit was paid and an agreement signed by him. There was no evidence as to the date when the defendant reached Germany, but it was some time between May 26 and June 11, 1915. In an action brought by the plaintiff for a declaration that the agreement for sale had been dissolved by the act of the defendant in becoming an alien enemy:—

Held by Eve J., that the plaintiff had failed to prove that on June 2, the date of the sale, the defendant was an alien enemy and that the action therefore failed.

Held by the Court of Appeal (reversing on this point the decision of Eve J.), that the proper inference to be drawn from the facts was that at the date of the sale the defendant had arrived and was resident in Germany and was therefore an alien enemy.

But *held* (Scrutton L.J. dissenting) that the power of attorney having been given by the defendant at a time when he was not an alien enemy, and being irrevocable for a year, was not avoided by his subsequently becoming an alien enemy; that the agreement entered into by the attorney in execution of the power did not involve any intercourse with the enemy, and was not therefore within the mischief of the common law or of the Trading with the

Enemy Proclamation of September 9, 1914, or of the Trading with the Enemy Acts, and was accordingly valid; that the sale could therefore legally be carried out by the attorney and if necessary be completed by a vesting order under the Trustee Act, 1893, or with the assistance of the custodian under s. 4 of the Trading with the Enemy Amendment Act, 1916; and that the plaintiff was not therefore entitled to have the agreement rescinded.

Porter v. *Freudenberg* [1915] 1 K. B. 857 followed.

Observations of Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) [1916] 2 A. C. 307, 347, applied.

APPEAL from a decision of Eve J.

The action was brought by the plaintiff, as purchaser, against the defendant, Emil Nathaniel Gustav Müller, as vendor of a leasehold house and premises called Hill Crest at Denmark Hill, held for a long term at a ground rent of 22*l.* 10*s.*, and the claim was for a declaration that the agreement of sale, dated June 2, 1915, had been dissolved by the act of the defendant in becoming an alien enemy, or, alternatively, that it was void ab initio as having been made with an alien enemy.

The defendant was a German by birth and had resided for many years in England, but had never been naturalized.

On May 20, 1915, he executed a power of attorney, whereby, after reciting he was about to proceed to Germany, he appointed his solicitor, Mr. John White, a member of the firm of Messrs. Whites & Co., to be his attorney to sell the house and premises and also the furniture therein by public auction or private contract, and to execute such transfers and deeds as were necessary, and in the meantime to receive the rents and profits and generally to manage the premises. The power was declared to be irrevocable for twelve months from the date thereof.

On May 26 the defendant obtained a Government permit from the police to travel to Tilbury with the object of embarking for Germany by way of Flushing, and he started on that day.

On May 27 Messrs. Whites & Co. wrote to the Public Trustee as follows:—

"Dear Sir,

"*Re Emil Nathaniel Gustav Müller, an alien German.*

"Our client, the above named Mr. Müller, left this country for Germany last night, via Flushing.

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"We enclose a list of the securities, &c., which he informs us he has deposited at his bankers, the London County and Westminster Bank, Camberwell Green.

"We have also to inform you that we hold a power of attorney from Mr. Müller to sell his leasehold house, Hill Crest, Sunray Avenue, Herne Hill [*sic*], and the furniture and effects upon the premises there. We shall be obliged if you will inform us whether we shall be at liberty to pay the purchase-money to Mr. Müller's credit at his bankers or whether such purchase-money is to be paid to you.

"Yours faithfully,
"Whites & Co."

On May 29 they received the following reply :—

"Dear Sirs,

"In reply to your letter of the 27th inst., I am directed by the Public Trustee to forward to you a copy of the Registration Order B, on which you should make a return to him of the proceeds of sale of the lease and furniture and effects belonging to Mr. E. N. G. Müller. The money is not to be paid over to the Public Trustee, but should be retained by you during the war.

"I am, dear sirs, yours faithfully,
"T. F. Swain,
"For the Public Trustee, Custodian
for England and Wales."

Before executing the power of attorney the defendant had instructed Messrs. John Bott & Sons, a firm of auctioneers, to offer the property for sale by public auction ; and on June 2, 1915, the leasehold premises were sold to the plaintiff by public auction for 1050*l.*, a deposit of 100*l.* paid, and an agreement signed by him purporting to purchase the property from Müller. A duplicate agreement was also signed by the auctioneers, John Bott & Sons, as agents for Müller, the vendor. The plaintiff also bought on the same day certain fittings and furniture which were in the house, and he left them in a locked room after taking possession.

There was no evidence as to the date when the defendant reached Germany, but it was on some date between May 26 and June 11, 1915. At this latter date it appeared from letters received by his solicitors that he was then resident in Hamburg.

On the plaintiff learning from the answers to requisitions on title that the defendant was a German by birth, and then (as the plaintiff alleged) voluntarily resident in Germany, he refused to proceed with the contract of sale on the ground that it was a transaction prohibited by the Trading with the Enemy Acts, 1914, and at common law. He further claimed a return of the deposit of 100*l.* and the costs of investigating the title.

The defendant by his defence pleaded that the sale was binding on the plaintiff, that he had been ordered by the British Government to leave England, and did not admit that at the date of the agreement he had been, or now was, voluntarily or otherwise resident in Germany, or an alien enemy. He expressed his willingness that the moneys payable to him under the agreement should be paid to and received by the Public Trustee as custodian under the Trading with the Enemy Acts, 1914 to 1916, or otherwise dealt with as the Court might direct. The defendant also thereby offered to consent to any order under the Trustee Act, 1893, or otherwise, vesting the premises in the plaintiff which might be necessary or advisable for the purpose of carrying the agreement into effect.

The action was tried before Eve J. on January 17, 1917, who held that it failed and must be dismissed with costs. His Lordship said that on the facts he could not draw the inference desired by the plaintiff, and that his claim was quite misconceived. The plaintiff had not established the fact that the defendant was an alien enemy. The defendant was not an alien enemy merely by reason of his being a German by birth; it was necessary to prove that he was resident in Germany at the date of the agreement for sale. According to *Porter* v. *Freudenberg* (1) the true test of a person being an alien enemy was the place where he resided or carried on business. It might be that the defendant could not claim specific performance of the agreement, but in the present proceedings the plaintiff had failed to discharge the onus of proof which was upon him.

The plaintiff appealed. The appeal was heard before the full Court of Appeal on March 23, 26, 1917.

Clayton, K.C., and *W. S. Sherrington*, for the appellant. The appellant claims a declaration that the agreement of June 2, 1915,

(1) [1915] 1 K. B. 857.

for the purchase by him of the defendant's house was void because the defendant was an alien enemy, or in the alternative that the agreement was dissolved by his having become an alien enemy before the contract was performed. He also asks for repayment of the deposit with interest and the costs of investigating the title. The true inference from the facts is that he arrived in Germany before June 2, 1915. At that date, therefore, he was an alien enemy. Whether he had so arrived or not, it is submitted that he became an alien enemy as soon as he left the shores of this country with the object of returning to Germany. Under these circumstances the contract must be treated as dissolved.

Any contract with an alien enemy is void, because all intercourse between British subjects and alien enemies is by law prohibited. A contract with an alien ami is dissolved if, before performance, he acquires the character of an alien enemy. (1) An alien enemy cannot contract either by himself or through an agent. An authority given by an alien ami to an agent is avoided when he becomes an alien enemy.

The Trading with the Enemy Acts and Proclamations of the present war are not exhaustive in the sense that they sanction everything which is not forbidden. They do not limit the old common law rules as to the incapacity of alien enemies. The general principle is that an alien enemy is exlex. At one time an alien enemy was regarded as an outlaw, and any one could seize his property: 2 Bl. Com. p. 401. In *The Hoop* (2) Lord Stowell lays down the general principle that all trading with the public enemy, unless with the permission of the Sovereign, is interdicted. And in *The Cosmopolite* (3) he said: "It is perfectly well known, that by war, all communication between the subjects of the belligerent countries must be suspended, and that no intercourse can legally be carried on between the subjects of the hostile States, but by the special licence of their respective Governments." There must be no communication either direct or by an agent; not only intercourse of a commercial character, but all intercourse is prohibited. That principle was adopted by Evans P. in *The Panariellos* (4) and by the Court of

(1) Rolle's Abr. (Tit.) Alien (B.), Alien Enemie, p. 195.

(2) (1799) 1 C. Rob. 196, 198.

(3) (1801) 4 C. Rob. 8, 10.

(4) (1915) 84 L. J. (P.) 140; (1916) 85 L. J. (P.) 112.

Appeal in *Robson* v. *Premier Oil and Pipe Line Co.* (1): see also *Halsey* v. *Lowenfeld.* (2)

[SCRUTTON L.J. referred to *London and Northern Estates Co.* v. *Schlesinger.* (3)]

Further, it is submitted that the power of attorney was avoided as soon as the respondent became an alien enemy. An alien enemy cannot deal with property in this country, and for that reason the State has instituted a controller who can do so. An alien enemy cannot act through an agent. A British subject cannot contract with him: *The Panariellos* (4); Story on Agency, 9th ed. s. 11, p. 11. A partnership between two persons residing and carrying on business in different countries is dissolved if war is proclaimed between those two countries, and all further intercourse between the partners is put a stop to: Lindley on Partnership, 8th ed. pp. 87, 648. That applies equally to the relationship of principal and agent.

The relationship, therefore, between the respondent and his agent was dissolved when he became an alien enemy: *Rex* v. *Kupfer* (5); *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie.* (6)

[SWINFEN EADY L.J. referred to *Griswold* v. *Waddington.* (7)]

These authorities show that the power of attorney is avoided. No action can be maintained either by or in favour of an alien enemy: *Brandon* v. *Nesbitt.* (8) It follows that the contract is dissolved: *Esposito* v. *Bowden.* (9)

Whether or not the true inference be that the respondent was in Germany before June 2, when he left these shores with the object of going there he became exlex and lost all right to the protection of the English laws: *The Indian Chief* (10); *The Flamenco* (11); *Janson* v. *Driefontein Consolidated Mines.* (12) After the respondent passed the three-mile limit his allegiance reverted to Germany.

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(1) [1915] 2 Ch. 124, 135.

(2) [1916] 2 K. B. 707.

(3) [1916] 1 K. B. 20.

(4) 85 L. J. (P.) 112, 116.

(5) [1915] 2 K. B. 321, 338.

(6) [1916] 1 K. B. 763.

(7) (1819) 16 Johnson, Sup. Ct. N. Y. 438.

(8) (1794) 6 T. R. 23.

(9) (1857) 7 E. & B. 763.

(10) (1801) 3 C. Rob. 12.

(11) (1915) 1 Br. & Col. P. C. 509.

(12) [1902] A. C. 484, 499.

[SWINFEN EADY L.J. referred to *Daimler Co.* v. *Continental Tyre and Rubber Co. (Great Britain).* (1)]

[*Ex parte Boussmaker* (2) was also referred to.]

It is further submitted that the performance of this contract is prohibited by the Acts and Proclamations against trading with the enemy: Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), s. 1, sub-s. 2; Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), s. 4. Under the Trading with the Enemy Proclamation No. 2, September 9, 1914, par. 5 (3), it was unlawful for the appellant to enter into the contract or to pay the purchase-money inasmuch as it would be for the benefit of the enemy. He is not, therefore, bound to perform the contract.

Jenkins, K.C., and *J. F. W. Galbraith*, for the respondent. The first question to be decided is one of fact, whether the plaintiff was resident in Germany at the date of the sale. There is no evidence that he was in Germany until August. The Court ought not, therefore, to assume that he was residing in Germany on June 2, when the sale took place. The onus of proof of showing that he was then so residing was on the plaintiff, and Eve J. was right in holding that he had not discharged it.

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(1) [1916] 2 A. C. 307.

(2) (1806) 13 Ves. 71.

(3) By the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, after reciting (inter alia) that "it is contrary to law for any person resident, carrying on business or being in Our Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without Our permission," it is declared (inter alia) as follows:—

Par. 3: "The expression 'enemy' in this Proclamation means any person or body of persons of whatever nationality resident or carrying on business in the enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country."

Par. 5: "From and after the date of this Proclamation the following prohibitions shall have effect, (save so far as licences may be issued as hereinafter provided), and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions—

"(1.) Not to pay any sum of money to or for the benefit of an enemy.

. . . . . .

"(9.) Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy.

. . . . . .

"And we do hereby further warn all persons that whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts, is guilty of a crime and will be liable to punishment and penalties accordingly."

[WARRINGTON L.J. The defendant left with a permit. Ought we not to infer that he reached Germany as soon as he could ?]

The Court ought to require strict proof of his arrival there, and ought not to draw such inference from the permit. The test of whether a person is an alien enemy as laid down in *Porter* v. *Freudenberg* (1) is the place where he resides or carries on business. It not having been shown that on June 2 the defendant was residing in Germany, he does not come within the definition of "enemy" in par. 3 of the Proclamation of September 9, 1914. (2) In that Proclamation, which by par. 5 (2) prohibits "any commercial, financial or other contract or obligation with or for the benefit of an enemy," the word "enemy" is confined to a person residing or carrying on business in an enemy country.

It is clear, therefore, that an Englishman may trade with a German in New York provided that the latter has not also a business in Germany. The policy of the law is to deplete the resources of the enemy. To assist the enemy is pro tanto to increase the resources of the enemy country and pro tanto to diminish those of this country. In determining whether a payment is "for the benefit of an enemy" regard must be had to all the circumstances of the case: *Rex* v. *Kupfer*. (3) In the present case what was done was not for the benefit of the enemy, but of this country. The purchaser would get the house at once, but the German vendor would only get the purchase-money after the war. In *Rex* v. *Kupfer* (3) the money was actually parted with. Here, unless the custodian intervenes, the purchaser will not be required to pay the purchase-money until the end of the war.

[WARRINGTON L.J. That would be making a new contract. It would be giving the purchaser the full benefit of the contract without performing his obligations under it.]

The custodian might obtain an order vesting the property in him subject to the contract under s. 4 of the Trading with the Enemy

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(1) [1915] 1 K. B. 857, 868.

(2) See note (3) on preceding page.

(3) [1915] 2 K. B. 321, 334, 336.

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Amendment Act, 1916 (5 & 6 Geo. 5, c. 105). There is no hardship on the plaintiff. He could have insisted on the contract being carried out and have obtained a vesting order under the Trustee Act, 1893, or with the assistance of the custodian under the Act of 1916. The completion of the contract would not involve any intercourse with the enemy.

[SCRUTTON L.J. referred to s. 1, sub-s. 2, of the Trading with the Enemy Act, 1914. Is not the definition of "enemy" in par. 3 of the Proclamation of September 9, 1914, narrower than that of the common law? At common law an enemy may reside in a neutral country.]

The definition of "enemy" and the offence of trading with the enemy must be kept distinct: *Janson* v. *Driefontein Consolidated Mines.* (1) The defendant did not become an alien enemy merely because he left these shores to go to Germany. No doubt if he sold his house here with the intention of taking the proceeds with him to Germany he would become an alien enemy in intention. It was not the policy of the Proclamation to defeat dealings with German assets provided that they did not go to Germany or that Germany did not benefit by what was done with them here. Sect. 3 of the Trading with the Enemy Amendment Act, 1914, impliedly authorizes the management here of property belonging to an enemy, and s. 4 provides that an order may be made vesting the property so managed in the custodian.

[SWINFEN EADY L.J. referred to s. 2, sub-s. 5.]

Prima facie no doubt management does not include a sale of the property. But in the present case the attorney was given full power by the power of attorney to sell the property and in the meantime to receive the rents and profits. The legal estate in the property no doubt remained outstanding in the defendant as principal, but it would have made no difference if it had been vested in the attorney. Some limit must be put upon the words "Not to enter into any commercial, financial or other contract with or for the benefit of an enemy" in par. 5 (9.) of the Proclamation. The Amendment Act of 1914 recognizes that a man may properly be managing a business here for a German, but he must give information to the custodian and obey the Proclamation.

(1) [1902] A. C. 484, 505.

[SWINFEN EADY L.J. It is not disputed that if the purchaser were a willing purchaser a good title could be made to the property.]

No. The vendor discharges his duty when he makes a complete title to the property. The Proclamation and the Trading with the Enemy Acts show that it is perfectly lawful that an alien enemy's property in this country should be managed. Where, however, a man is an alien enemy he cannot appoint an agent here to deal with his property: *Continental Tyre and Rubber Co.* (*Great Britain*) v. *Daimler Co.* (1) In that case all the directors of the plaintiff company were Germans and purported to delegate their secretary to act here. The decision shows that if the authority had been given before the war it would have been valid. *Esposito* v. *Bowden* (2) has no bearing on the question of the constitution of an agent by a principal.

[SCRUTTON L.J. referred to the statement in the judgment of Lord Reading C.J. in *Maxwell* v. *Grunhut* (3) that "the agent could have no greater right than his principal who, being an alien enemy, could not sue."]

As regards the question of intercourse with the enemy, the alleged invalidity of the contract is ex post facto. It is contended that the contract cannot be carried out because it would involve intercourse with an alien enemy. It is submitted, however, that this is not so: *Robson* v. *Premier Oil and Pipe Line Co.* (4); *Halsey* v. *Lowenfeld.* (5) In the present case the contract admittedly could have been carried out without any intercourse with the enemy. It was authorized by a person who at the time the authority was given was not an alien enemy. The contract, therefore, was not void ab initio but can be carried out in a perfectly legal manner by a deed executed by the attorney. The power of attorney involves no intercourse between the principal and his attorney and was not avoided by the principal afterwards becoming an alien enemy: *Williams* v. *Paine* (6); *Kershaw* v. *Kelsey.* (7) Moreover, as the purchase-money would be retained during the war, the vendor could derive no benefit therefrom until peace was declared, if at all. Therefore the transaction is not for the benefit of an enemy: see per Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co. (Great Britain).* (1)

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(1) [1915] 1 K. B. 893.
(2) 7 E. & B. 763, 779.
(3) (1914) 31 Times L. R. 79, 80.
(4) [1915] 2 Ch. 124.
(5) [1916] 2 K. B. 707, 716.
(6) (1897) 169 U. S. 55.
(7) (1868) 100 Mass. 561.

Clayton, K.C., in reply. The decision in the *Daimler Case* (2) does not suggest that the authority of the directors continued after they became alien enemies. The passage referred to in Lord Parker's speech (1) has no bearing on this case. The company there was held not to be a German company, but to remain an English company although its directors were all Germans. The passage had reference to the case where the company remained an English company. The question the House of Lords had to determine was whether the authority given to the secretary was given before the outbreak of the war, and they held as a fact that it had not been so given.

In *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (3) it was held by Atkin J. that an agency was terminated upon the principal becoming an alien enemy, and his decision on that point was affirmed by the Court of Appeal (4), although his judgment was reversed on another ground.

[SWINFEN EADY L.J. The agency in that case was for the sale of German machines and necessarily involved intercourse with the enemy.]

The general principle of law is that whatever is done over here by an agent is done by the principal: *Brandon* v. *Nesbitt* (5); *Maxwell* v. *Grunhut.* (6) The Proclamation of September 9, 1914, is absolutely in point. This contract cannot be carried out except for the benefit of the enemy.

[WARRINGTON L.J. I doubt whether the Proclamation could render illegal what was not already so either by statute or the common law.]

A contract which remains unperformed after one of the parties to it has become an alien enemy is ipso facto dissolved. The provision as to a branch establishment in the Trading with the Enemy Act, 1914, assists the plaintiff, since it shows that but for express legislation it would have been illegal to deal with such a branch.

As regards *Williams* v. *Paine* (7) and *Kershaw* v. *Kelsey* (8), the

(1) [1916] 2 A. C. 347.
(2) [1916] 2 A. C. 307.
(3) [1916] 1 K. B. 763.
(4) (1916) 33 Times L. R. 84; since reported [1917] 1 K. B. 842.
(5) 6 T. R. 23.
(6) 31 Times L. R. 79.
(7) 169 U. S. 55.
(8) 100 Mass. 561.

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American Courts have often laid it down that an "enemy" in one of the Confederate States was not to be regarded in the same light as an enemy in an independent State. The cases are not binding on this Court.

[SWINFEN EADY L.J. Do you draw any distinction between the case of the contract being made by the attorney under his power of attorney and of its being made by the auctioneer acting under the direct instructions of the defendant?]

No; except that if it were made by the auctioneer the case would be an a fortiori one. It is unnecessary to show that the carrying out of the contract would be to the advantage of the enemy or detrimental to this country. It would, however, be an advantage to the defendant not to have to pay the ground rent.

Cur. adv. vult.

May 11. The following judgments were delivered:—

LORD COZENS-HARDY M.R. (after stating the facts). In these circumstances the purchaser claims the return of his deposit on several grounds. He contends that Müller was an alien enemy on June 2, and that therefore the contract was illegal. Eve J. held that this fact had not been proved, and, this being the sole point raised before him, he dismissed the action. I cannot agree with this view. I think there is a presumption of fact that a man who left Tilbury on the evening of May 26 for Flushing reached Germany before June 2, and that in the absence of any other evidence a jury would be justified in finding that he did reach Germany before June 2. He was not an alien enemy while he was in England. He did not become such the moment he left our shores.

The meaning of "alien enemy" has from time to time varied. "Nationality" and "domicil" have both been treated as the critical test. The question was elaborately discussed in the full Court of Appeal in *Porter* v. *Freudenberg* (1), and it was held that neither domicil nor nationality is the true test. That decision is final so far as this Court is concerned. Residence in Germany, not merely crossing the German frontier from Holland, made him an alien enemy. Intention to reside is not sufficient. Residence implies a certain lapse of time. But, having regard to the abandonment of his British residence and to the fact that he was resident in Hamburg at least from August, if not earlier, I think it is right to hold that on June 2 Müller had become an alien enemy. The point taken before Eve J. cannot, in my opinion, be supported. This, however, by no means disposes of the case. (I only mention residence because there is no suggestion of carrying on business apart from residence.)

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(1) [1915] 1 K. B. 857.

I attach great weight to the power of attorney of May 20. At that date it is beyond dispute that Müller was not an alien enemy. The authority conferred upon White was complete and irrevocable. No further "intercourse" with Müller was needed. White could not be interfered with in reference to the sale. White's position was, having regard to the provisions of the Conveyancing Acts, practically the same as if Müller had conveyed the property to White upon trust for sale. Lord Parker, in the passage to which I shall refer lower down, seems to me to assert that a trust for sale may be executed although the sole beneficiary is an alien enemy. The transaction is not a trading with the enemy within the mischief of the common law, or within the mischief of the Proclamation of September 9, 1914. Par. 3 adopts the rule in *Porter* v. *Freudenberg* (1) by stating it in a positive and also in a negative form. The expression "enemy" means any person resident or carrying on business in an enemy country, but does not include persons of enemy nationality who are neither resident nor carrying on business in the enemy country. Par. 5 (1.) applies only to a payment during the continuance of the war. Par. 5 (9.) has no application if, as I hold, the power of attorney was the only contract or obligation with or for the benefit of Müller.

But can it be said that the power of attorney was necessarily revoked when Müller became an alien enemy? I think not. It is true that most agencies, involving as they do continuous intercourse with an alien enemy, are revoked, or at least suspended. But such considerations have no bearing upon a special agency of this nature. Mr. Galbraith called our attention to a case decided in 1897 in the Supreme Court of the United States—*Williams* v. *Paine*. (2) A power of attorney granted by an officer and his wife resident in Pennsylvania to convey land in the city of Washington was held not

(1) [1915] 1 K. B. 857.

(2) 169 U. S. 55.

to be revoked by the war, in which the grantors of the power took an active part with the Confederates, but to be well executed notwithstanding the war.

It must not be forgotten that a contract for sale of land stands in a peculiar position. It is for many purposes to be regarded as an equitable conveyance. The objection taken by the purchaser is not really as to title, but only as to conveyance. Time was not of the essence of the contract. The legal estate if not got in by a deed, executed by Mr. White, as I think it might be, could probably be got in by an application under the Trustee Acts, and certainly by an application under the Trading with the Enemy Amendment Act, 1916, s. 4. If an order were made under that section all difficulty would be removed.

The recent case in the House of Lords of *Daimler Co.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) (1) is not a direct decision upon the points raised in the present case. But I have derived great assistance from the observations of Lord Parker. (2) He points out: "I see no reason why a company should not trade merely because enemy shareholders may after the war become entitled to their proper share of the profits of such trading. I see no reason why the trustee of an English business with enemy cestuis que trust should not during the war continue to carry on the business, although after the war the profits may go to persons who are now enemies, or why moneys belonging to an enemy but in the hands of a trustee in this country should not be paid into Court and invested in Government stock or other securities for the benefit of the persons entitled after the war. The contention appears to me to extend the principle on which trading with the enemy is forbidden far beyond what reason can approve or the law can warrant. In early days the King's prerogative probably extended to seizing enemy property on land as well as on sea. As to property on land, this prerogative has long fallen into disuse. Subject to any legislation to the contrary or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war. In the meantime it would be lamentable if the trade of this

(1) [1916] 2 A. C. 307. (2) [1916] 2 A. C. 347.

country were fettered, businesses shut down, or money allowed to remain idle in order to prevent any possible benefit accruing thereby to enemies after peace. The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes."

The weight attributable to those observations is greatly increased by the circumstance that Lord Parker's judgment was formally approved of and concurred in by Lord Mersey, Lord Kinnear and Lord Sumner.

The result is that in my opinion the plaintiff is not entitled to demand a return of his deposit, and the appeal fails.

SWINFEN EADY L.J. (after recapitulating the facts). Those being the facts, the plaintiff has brought this action in which he claims that his contract to purchase the said leasehold property has been dissolved by the act of the defendant in becoming an alien enemy, or in the alternative that it is void as being made with an alien enemy, and he asks for a return of his deposit and consequential relief. The defendant denies that the contract is invalid. His solicitor communicated with the Public Trustee immediately upon the defendant leaving for Germany and explained the facts and asked whether the purchase-money for the property should be paid to Mr. Müller's credit at his bankers' or should be paid to the Public Trustee, and that official answered by enclosing a copy of Registration Order B, on which Mr. White was requested to make a return of the proceeds of the sale of the lease and furniture and effects belonging to the defendant, and the Public Trustee further informed Mr. White that the money was not to be paid over to him, but was to be retained by Mr. White during the war.

By his defence the defendant expressed his willingness that the purchase-moneys should be paid to and received by the Public Trustee as custodian under the Trading with the Enemy Acts, 1914 to 1916, or otherwise dealt with as the Court might direct. The defendant also thereby offered to consent to any order under the Trustee Act, 1893, or otherwise vesting the premises in the plaintiff which might be necessary or advisable for the purpose of carrying the agreement into effect. The action was dismissed by Eve J., and the plaintiff appeals.

The plaintiff has contended before us that as the defendant, having broken up his establishment here and given directions for realizing his house and furniture, left England on May 27, 1915, to go direct to Germany, and as he was certainly in Germany at a later date, the inference to be drawn from the facts proved is that he went direct to Germany and arrived there on or before June 2, and therefore that the contract of June 2 was illegal as made with an alien enemy, and that in any case it would be illegal to carry out the contract, as any payment he might make would be a payment to or for the benefit of an alien enemy, which is forbidden by the Proclamation against trading with the enemy and therefore illegal.

The question upon which this appeal turns therefore resolves itself into this: Was the agreement of June 2 illegal when made, or has it since become illegal to carry it out?

The statute 4 & 5 Geo. 5, c. 87, which imposes penalties for trading with the enemy, provides, s. 1, sub-s. 2, as follows: "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy."

By the Trading with the Enemy Proclamation No. 2, dated September 9, 1914, it is provided as follows: "5. From and after the date of this Proclamation, the following prohibitions shall have effect, (save so far as licences may be issued as hereinafter provided), and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions—(1.) Not to pay any sum of money to or for the benefit of an enemy. . . . . (9.) Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy."

It was urged by the appellant that entering into the contract of purchase on June 2 was a transaction forbidden by sub-par. 9 of the Proclamation, as on that date it must be taken that the defendant had reached Germany and was an alien enemy. It was also urged on behalf of the appellant that if he were now to pay the balance of his purchase-money to Mr. White in order to complete his purchase

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he would be offending against par. 5 (1.) of the Proclamation. In my opinion neither of these contentions is well founded.

It was the auctioneers who as agents for the vendor knocked down the property to the plaintiff and made the contract of June 2, the authority so to do having been conferred upon the auctioneers by the defendant when in this country. The making of this contract did not involve any intercourse with the enemy ; nor will the completion of the contract and the conveyance of the property necessitate any such intercourse, as the irrevocable power of attorney to Mr. John White fully empowers that gentleman to convey the property and receive the purchase-money without communicating further with the defendant. A contract entered into in England with an agent in England who derives his authority from instructions given to him in England or from a deed poll executed in England by a German principal who subsequently proceeds to Germany is not a transaction forbidden by the Proclamation, nor in particular by sub-par. 9 of it. It is not a transaction entered into "for the benefit of an enemy," which "contemplates his benefit during the war and not the possible advantage he may gain when peace comes" : per Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co. (Great Britain)*. (1) In this judgment Viscount Mersey, Lord Kinnear, and Lord Sumner concurred. The money paid for the property will be retained by Mr. John White or paid to the Public Trustee, and will not be remitted to the defendant during the war, nor will he derive any benefit from it during the war. The consideration money will not be paid "to or for the benefit of an enemy" within the meaning of the Proclamation, nor in particular within the meaning of par. 5 (1.).

Nor is the contract in question one entered into "with an enemy" within the meaning of par. 5 (9.). It does not involve any communication or intercourse with the enemy. It is not the case of a person who, being an enemy and while he is such, purports to confer an authority on some one here. Such an authority could not lawfully be given, except under licence from the Crown.

That a contract entered into in England with a person here who simply holds or manages property belonging to an enemy is not unlawful is apparent from the provisions of the Trading with the

(1) [1916] 2 A. C. 347.

Enemy Amendment Act, 1914. Thus s. 2, sub-s. 1, of that Act provides that any "share of profits" payable to an enemy shall be paid to the custodian of enemy property, and s. 2, sub-s. 5, provides that "where a person is carrying on any business on behalf of an enemy, any sum which, had a state of war not existed, would have been transmissible by a person to the enemy by way of profits from that business shall be deemed to be a sum which would have been payable and paid to that enemy." This section thus contemplates that a person may lawfully be carrying on business here on behalf of an enemy.

Again, s. 3, sub-s. 1, requires that any person who holds or manages for or on behalf of an enemy any property real or personal shall furnish the custodian with certain particulars. The Public Trustee, who is the custodian for England and Wales, required Mr. White to make a return on the form applicable (Registration Order B, s. 3, sub-s. 1), and this was duly done. This again recognizes that persons here may lawfully hold or manage property on behalf of an enemy, but they are bound to obey the statutory provisions with reference to it. In one sense every contract made by such persons with reference to such property is a contract made for the benefit of an enemy, because an enemy may gain a benefit from it when peace comes, but such a contract is not in my opinion a contract forbidden by the Proclamation.

Again, s. 4, sub-s. 1, has further reference to real or personal property belonging to or held or managed for or on behalf of an enemy, thus recognizing such a state of things as existing legally.

Again, the Trading with the Enemy Amendment Act, 1916, is to the like effect. By s. 4, sub-s. 1, the Board of Trade is empowered to vest in the custodian any real or personal property belonging to or held or managed for or on behalf of an enemy.

I am of opinion that the contract of June 2, 1915, was a legal contract and that the property can be lawfully and effectually conveyed to the plaintiff, and that Mr. White, as the attorney of the defendant, can receive and give a valid discharge for the balance of the purchase-money, and that the plaintiff is not entitled to have the contract rescinded or to be relieved from it.

In my judgment the appeal fails and should be dismissed.

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BANKES L.J. (after stating the facts). The present action was commenced on December 21, 1915. The writ was indorsed with a claim "For a declaration that the agreement dated the 2nd day of June, 1915, and purporting to have been made between the defendant and the plaintiff for the sale of a leasehold house known as Hill Crest, Sunray Avenue, Denmark Hill, is void, or has been dissolved, by reason of the defendant without the knowledge of the plaintiff being at that time an alien enemy or having since become so." The first ground of this claim must be founded upon the fact that the defendant was an alien enemy at the date when the agreement was made. The second ground must be founded upon the impossibility of completing the purchase without infringing the law against trading with the enemy. The learned judge in the Court below decided against the plaintiff's claim. He refused to draw the inference from the evidence that the plaintiff had arrived and was resident in Germany by June 2 and was therefore an alien enemy on that date. If it was necessary to decide this point I should not be prepared to agree with the view of the learned judge. I think the natural inference from the facts is that the defendant must have arrived in Germany before June 2, and if so that he was on that date resident there within the meaning of that expression when used in reference to an alien enemy.

Assuming that to be so, how does it affect the plaintiff's claim? It is said that it brings the case within the provisions of the Trading with the Enemy Act, 1914, and of the Trading with the Enemy Proclamation No. 2, and that the agreement of June 2 is invalid because it comes within the language of the prohibitions contained in the Proclamation. In my opinion this is not so. The statute and the Proclamation are both dealing with criminal offences. The particular offence of entering into a contract with an enemy which is forbidden by par. 5 (9.) of the Trading with the Enemy Proclamation No. 2 is one where, in my opinion, a knowledge of the facts which render the Act unlawful is an essential element of the offence. In the present case it is part of the plaintiff's case that he entered into the agreement of purchase quite innocently and in entire ignorance that he was dealing with an enemy. Under these circumstances he cannot, in my opinion, claim to be relieved of his bargain on the ground that he was guilty of a crime, when the fact is that he was entirely innocent.

There remain, therefore, the two questions of whether the contract was unlawful at common law, and whether, assuming that not to be so, any proceeding to complete the purchase with knowledge that the defendant is an enemy is forbidden by the statute and the Proclamation. I think that these two questions, under the peculiar circumstances of this case, should be considered together.

The material facts appear to be these. The defendant while in this country had given the auctioneers the necessary authority to put the property up for auction. There is no evidence that at the time they did so they were aware that the defendant was in Germany, or that he had left this country. The plaintiff was certainly unaware of either fact. Before leaving this country the defendant had given to Mr. White a power of attorney which purported to be irrevocable for twelve months, which gave him full authority to complete the sale, and which did not necessarily involve any communication with the defendant, either in reference to the sale or the disposal of the purchase-money. Before the writ was issued the attorney had taken the instructions of the Public Trustee as to the disposal of the purchase-money, of which he had informed the plaintiff. By his defence the defendant expressed his willingness that the purchase-money should be paid to, and received by, the Public Trustee as custodian under the Trading with the Enemy Acts, 1914 to 1916, or otherwise dealt with as the Court might direct, and he further consented to any order being made under the Trustee Act, 1893, or otherwise vesting the premises in the plaintiff which might be necessary or advisable for the purpose of carrying the agreement into effect. I do not see any ground for saying that the fact that the defendant has become an enemy has put an end to the power of attorney. Even if it had, there is power in the Board of Trade under s. 4 of the Trading with the Enemy Act, 1916, to give the custodian full power to convey the property, so that no difficulty need arise on that ground. The completion of the sale will not involve any communication with the defendant, or any payment to him or for his benefit, while the war lasts.

Why then should the Court interfere? Is there anything in the contractual relations of the parties at their present stage which can be said to offend against either the principles of the common law or the provisions of any statute if the purchase is allowed to proceed to completion? I think not. The alternative appears to be either to condemn the property to remain derelict until the end of the war, or to hold the plaintiff to his bargain with the variation imposed by statute that the purchase-money is to be held up and not paid over to the vendor until the war is over. I think that the latter is not only the reasonable course, but it is the one which is in accordance with the law. In my opinion the appeal fails.

WARRINGTON L.J. (after stating the facts). I think the true inference from the facts is that the defendant arrived in Germany for the purpose of taking up his residence there some time before June 2, and was therefore an alien enemy at the date of the contract. His expressed object in leaving this country was to proceed to Germany and nowhere else, and this is also admitted on the pleadings, and in the absence of evidence to the contrary I cannot hold that he abandoned this intention; there was ample time, even allowing for abnormal delays occasioned by the state of war, to reach Germany before June 2. On the whole, then, I think the case must be dealt with on the footing that the defendant was an alien enemy at the date of the contract, and I propose to deal with it on that footing.

The contract in this case is for the sale of land. Until the passing of the Naturalization Act, 1870, no alien was capable of acquiring, holding, or disposing of land, except a leasehold residence or place of business for a term not exceeding twenty-one years. This disability was first removed by s. 2 of the Naturalization Act, 1870, which provides that real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; this provision is re-enacted by s. 17 of the British Nationality and Status of Aliens Act, 1914, the statute in force at the date of the contract in question. A contract for sale of land is a preliminary to a final disposition of the land, and is indeed in equity itself a conditional disposition, and the land from the date of the contract is considered as belonging to the purchaser, subject, of course, to the payment of the purchase-money and the vendor's lien therefor:

see Williams on Vendor and Purchaser, 2nd ed. vol. i. p. 504. The contract, therefore, is not simply executory; although the purchase-money is not paid, it at once gives the purchaser an equitable interest in the land, and it confers on the vendor a lien for his purchase-money.

Again, a recognized mode of dealing with land is through an attorney acting under a power of attorney. If such a power is made irrevocable, as is the case with that of May 20, 1915, then, in favour of a purchaser, not only can it not be revoked in the ordinary sense, but any act done by the donee within the limits of the authority conferred by the power will be as valid as if anything done by the donor of the power without the concurrence of the donee had not been done: Conveyancing Act, 1882, s. 9. The attorney under such a power is not like an ordinary agent. As between him and a purchaser he is, so long as he does not exceed his authority, absolutely independent of the principal. He has no occasion to consult or confer with him, and he need pay no attention to any directions he may give. The attorney in fact, when dealing with a purchaser, is exclusively clothed with all the capacities of the principal in reference to the subject-matter.

The contract in the present case is made by the attorney. It is true it is signed by the auctioneers who received their original instructions from the defendant himself; but before the sale was effected the attorney was the only person who had power to sell—the auctioneers became subject to his directions and must be taken to have been acting on his behalf.

The question then is, Does the fact that the principal is an alien enemy avoid a contract for the sale of land made by his attorney appointed by an irrevocable power before he had assumed enemy character? In the first place, so to hold would involve the further decision that a final disposition of the land by the attorney would also be void inasmuch as there is no difference in principle between the two classes of disposition.

There is no reported decision bearing directly on the question, owing, no doubt, to the modern origin of the holding of land by aliens. The decisions (except *Halsey* v. *Lowenfeld* (1), which is not in point) are in reference to commercial transactions and transactions

(1) [1916] 2 K. B. 707.

of a similar nature. It is necessary, therefore, to ascertain what are the principles of law on the subject and how they are applicable to the novel circumstances with which we have to deal in the present case. I propose to consider, first, the principles of the common law and to inquire whether there is anything in them to require the avoidance of the contract, and then to ascertain whether there is anything in the statutes or the Proclamation bearing on the subject which affects the question.

In the first place, it is, I think, well settled that by the rules of the common law when this nation is at war with another no British subject can lawfully have any intercourse, commercial or otherwise, with an enemy except by the permission, express or implied, of the executive authority of the State. As to commercial intercourse, this is clearly laid down by Lord Stowell in *The Hoop*. (1) I attach great importance to the ground on which that very learned judge rests the principle. It is this, that such intercourse pro tanto interrupts the state of war which exists between subjects of enemy States, and as the Sovereign alone has the power to declare peace and war he alone can make lawful such an interruption. That intercourse, other than commercial, is also forbidden, see *Robson* v. *Premier Oil and Pipe Line Co.* (2) This rule is, I think, absolute, and the prohibition does not depend on the question whether the intercourse may or may not tend to the advantage of the enemy or the detriment of this country. As to this there is a further rule which I will mention and discuss presently. Does the rule I am now considering prohibit intercourse between two British subjects one of whom is the attorney of an enemy but in a position to deal with the subject-matter independently of the enemy ? I cannot think it does. On this point the ground of the rule as stated by Lord Stowell seems to me of great importance. The intercourse between two British subjects under such circumstances causes no interruption of the state of war, and the reason for the prohibition does not exist. So far, then, as the common law is concerned the rule I am now discussing does not render it necessary to avoid the present contract. Is there anything in the Proclamation or the statutes which compels me to arrive at a different conclusion ? The Proclamation of September 9, 1914, contains the following provision bearing on the

(1) 1 C. Rob. 196.

(2) [1915] 2 Ch. 124.

subject. First there is the recital: "Whereas it is contrary to law for any person resident, carrying on business or being in Our Dominions, to trade or have any commercial or financial transactions with any person resident or carrying on business in the German Empire or Austria-Hungary without Our permission." Then in the operative part: "5. From and after the date of this Proclamation the following prohibitions shall have effect, (save so far as licences may be issued as hereinafter provided), and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions"—amongst other things—"(1.) Not to pay any sum of money to or for the benefit of an enemy"; and "(9.) Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy." The recital shows, in my opinion, that it was not intended to extend the operation of the Proclamation so as to prohibit what was not already prohibited by common law. Moreover, par. 5 (9.) is not an absolute prohibition of all contracts or obligations, but only of such as are with an enemy or for the benefit of an enemy, and par. 6, whatever may be its true construction in a concrete case when it arises, clearly contemplates persons in this country acting for an enemy, and provides that transactions with them shall not be treated as transactions with an enemy. It seems to me, therefore, that the contract in question, not being prohibited by the common law rule I am now considering, is not prohibited by the Proclamation.

Now as to the statutes. The first material statute is the Trading with the Enemy Act, 1914, and the only section it is necessary to read is sub-s. 2 of s. 1: "For the purposes of this Act a person shall be deemed to have traded with the enemy if he has entered into any transaction or done any act which was, at the time of such transaction or act, prohibited by or under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, or which at common law or by statute constitutes an offence of trading with the enemy: Provided that any transaction or act permitted by or under any such Proclamation shall not be deemed to be trading with the enemy." This does no more than give statutory effect to the rules of common law and the prohibitions of the Proclamation.

The next statute is the Trading with the Enemy Amendment

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Act, 1914. As to this it is enough for the present purpose to say that in s. 3 it clearly recognizes that real or personal property of an enemy may be held or managed for or on his behalf by some person in this country, and makes provision for such cases, but does not purport to invalidate any contracts entered into by such person. Real property can hardly be managed without the making of some contracts by the manager, such, for example, as contracts of tenancy, contracts for the sale of produce, for labour, and for purchase of live and dead stock, and so on. This all goes, to my mind, to confirm the view that such a contract as the present is not to be treated as within the prohibition which I am now considering.

But there is a further rule of the common law which it is necessary to consider—that is, that no British subject can, without the permission of the Executive, have any dealings with any person, whether an enemy himself or some other person in this or in a neutral country, on behalf of an enemy which may possibly tend to the benefit or advantage of the enemy or the detriment of this country: *Rex* v. *Kupfer*. (1) The question whether a transaction which cannot possibly so tend is within the prohibition was left open by this Court in *Robson* v. *Premier Oil and Pipe Line Co.* (2) It was said by Lord Parker in the *Daimler Case* (3), in effect, that the benefit or advantage contemplated by this rule is a benefit or advantage accruing during the war, and the fact that after the war and not till then a benefit will accrue to the enemy is not sufficient to render a transaction illegal. He sums up his view on this point in the following words: "The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he may gain when peace comes." This judgment was prepared with the assistance and collaboration of Lord Sumner and was adopted as their own by Lords Mersey and Kinnear.

The Proclamation of September 9, 1914, in par. 5 (1.) warns persons not to pay any sum of money to or for the benefit of an enemy. It is contended on behalf of the plaintiff that it would, under the rules of the common law and under the Proclamation, be illegal for him to pay the purchase-money inasmuch as that would be a payment for the benefit of the enemy, and that therefore he is excused from performance. The payment in the present case would properly be made to the attorney in this country and not to the enemy himself. The attorney in the present case has complied with s. 3 of the Trading with the Enemy Amendment Act, 1914, by communicating the facts to the custodian and asking for his directions, and the custodian in reply has directed him to keep the money. It must, I think, be presumed that Mr. White will do his duty as he has hitherto done it, and if so, the result will be that the enemy will part with his property and be kept out of his purchase-money until the end of the war. Moreover, if there be any doubt as to the propriety of the payment of the purchase-money to the attorney, the last-mentioned statute provides machinery extended by the Trading with the Enemy Amendment Act, 1916, s. 4, whereby the right to recover and receive the purchase-money may be vested in the custodian, who will in that case hold it until the termination of the present war and thereafter deal with the same in such manner as His Majesty may by Order in Council direct. The result is, in my opinion, that the contract can be carried out without requiring the plaintiff to do any act which is illegal either at common law or under the Proclamation or the statutes.

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(1) [1915] 2 K. B. 321.

(2) [1915] 2 Ch. 124.

(3) [1916] 2 A. C. 347.

There remains one point to consider. It has been contended that the authority of the attorney was determined by the assumption by the principal of enemy character, and the case of *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (1) is relied upon in support of that contention. In that case, however, it was pointed out by Atkin J. that the agency agreement there held to be determined necessarily involved commercial intercourse with an enemy, and I gather this was also the ground of the assent to Atkin J.'s conclusion expressed by the Court of Appeal. (2) As I have already pointed out, the attorney in the present case exercises his powers without reference to his principal, and that being so, I can find nothing in reason or authority which would justify me in saying that the power of attorney is avoided. On this point I also refer to the American case of *Williams* v. *Paine.* (3)

On the whole I come to the conclusion that, although in my opinion the defendant had assumed enemy character at the date of

(1) [1916] 1 K. B. 763.

(2) 33 Times L. R. 84; since reported [1917] 1 K. B. 842.

(3) 169 U. S. 55.

the contract, the contract was a valid and binding contract. If I am wrong in finding that the defendant was an enemy at the date of the contract, then it follows from what I have said that his subsequent assumption of enemy character did not involve the doing by the plaintiff of an illegal act in performing his part of the contract, and did not, therefore, excuse him from performance.

Eve J. was in my opinion right in dismissing the plaintiff's action, though not for the reason given by him, and this appeal fails and should be dismissed.

SCRUTTON L.J. (after stating the facts). Two main questions are involved in this appeal: (1.) Did any part of the transaction involve Tingley in the offence of trading with the enemy, if Müller were an alien enemy? (2.) When did Müller become an alien enemy? Trading with the enemy was at first committed principally in relation to ships, their cargoes, and the insurances thereon, and the first detailed exposition of the law was given by Lord Stowell in *The Hoop* (1) in 1799. At common law, owing to the attitude of Lord Mansfield towards insurances, the law had been uncertain (see per Lord Mansfield in *Gist* v. *Mason* (2) and per Buller J. in *Bell* v. *Gilson* (3)); but in 1800, in *Potts* v. *Bell* (4), Lord Kenyon practically adopted verbatim the judgment of Lord Stowell "that trading with an enemy without the King's licence was illegal in British subjects." In Lord Stowell's view neither commercial intercourse with the enemy nor, under its cover, any other species of intercourse could be carried on except with the direct permission of the State. This was both because of the danger to the State from such intercourse and of the impossibility of enforcing any such contracts by suit. As stated by Willes J. in *Esposito* v. *Bowden* (5), a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country; and in the case of contracts made before the declaration of war, but which remain unexecuted when it is declared, if the further execution is unlawful or impossible as involving intercourse with the enemy, the contract is dissolved, and both parties are absolved from further performance

(1) 1 C. Rob. 196.
(2) (1786) 1 T. R. 84.
(3) (1798) 1 Bos. & P. 345, 354.
(4) (1800) 8 T. R. 548, 561.
(5) 7 E. & B. 779, 783.

of it. When the present war broke out the President of the Probate Division collected the authorities in his judgment in *The Panariellos* (1) stating the illegality to extend to all intercourse, whether commercial or otherwise, and a similar conclusion was reached in this Court in *Robson* v. *Premier Oil and Pipe Line Co.* (2), where Pickford L.J. stated that all intercourse, whether commercial or otherwise, with an alien enemy which might injure this country or help the enemy was illegal, but reserved the question whether intercourse which could not possibly have the above effect was illegal.

I think it very dangerous that British citizens should be allowed to speculate whether their intercourse with the enemy can injure their country or help the enemy and to deal with the enemy if they persuade themselves such intercourse is harmless. This may open an excuse for many undetected but injurious transactions. Lord Stowell in *The Hoop* (3) took the view that " it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcileable with the general interest of the State. It is for the State alone, on more enlarged views of policy, and on consideration of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations." In my view the question left undetermined by the Court of Appeal in *Robson's Case* (4) should be answered emphatically by saying that no intercourse with an alien enemy should take place unless by permission of the State.

What at the present time constitutes an " alien enemy " ? In the *Driefontein Case* (5) Lord Davey said : " There are three rules which are established in our common law. The first is that the King's subjects cannot trade with an alien enemy, i.e. a person owing allegiance to a Government at war with the King, without the King's licence." In the same case Lord Lindley (6) said : " When considering questions arising with an alien enemy, it is not the nationality of a person, but his place of business during war that is important . . . .

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(1) 84 L. J. (P.) 140 ; affirmed 85 L. J. (P.) 112.

(2) [1915] 2 Ch. 136.

(3) 1 C. Rob. 196, 199.

(4) [1915] 2 Ch. 124, 136.

(5) [1902] A. C. 499.

(6) [1902] A. C. 505.

the validity of his contracts does not depend on his nationality, nor even on what is his real domicil, but on the place or places in which he carries on his business or businesses." The full Court of Appeal in *Porter* v. *Freudenberg* (1) state the law thus : " It is necessary at the outset to keep clearly in mind the meaning of the term ' alien enemy ' when used in reference to civil rights and liabilities. Its natural meaning indicates a subject of enemy nationality, ... but that is not the sense in which the term is used in reference to civil rights. . . . . It is clear law that the test for this purpose is not nationality but the place of carrying on the business. . . . . For the purpose of determining civil rights a British subject or the subject of a neutral State, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy." And, turning to one of the leading authorities on international law, Mr. Hall (International Law, 6th ed. p. 491) says : " The chief test of the existence of such an identification of a neutral subject with an enemy State as will suffice to clothe him with an enemy character is supplied by the fact of domicil."

These passages are at first sight sufficiently contradictory to render it necessary to examine carefully what the present basis of enemy character is ; for the Court of Appeal and Lord Davey appear directly to contradict each other, and Lord Lindley and Mr. Hall seem to take exactly opposite views of the importance of domicil.

Originally war declared by one prince against another involved in its consequences all the subjects of both, who were exhorted in the customary proclamation " Courir sus aux ennemis " (Westlake's International Law, pt. ii., War, p. 36). Grotius (Lib. iii. c. III. pl. ix.) states that " a war declared against him who has the supreme authority in a population is considered to be declared against all his subjects." Allegiance was then the test of " alien enemy." In the time of *Calvin's Case* (2) the alienigena (alien born) might become an enemy by a war with his prince. It is this governing principle that is stated by Lord Davey in the *Driefontein Case.* (3) But with the growth of commerce and greater tenderness to private property an alleviation or exception was introduced into the rule of allegiance or nationality. An alien enemy by allegiance could lose his enemy character for the time if he was residing in the King's dominions or trading there by the licence of the Crown. It used to be, and probably still is, necessary to show a licence or permission from the Crown, express or implied: *Alciator* v. *Smith* (1); *Alcinous* v. *Nigreu.* (2) A subject by allegiance could for the time lose his friendly or national character by residing or trading in the enemy's dominions. Either party by trading or residing in a neutral country might acquire for the time a neutral character. The conditions under which this loss of national character might be achieved and under which the new character by residence might be lost have been carefully considered by Lord Stowell in several cases where questions of trading with the enemy or the enemy ownership of property seized as prize were in dispute.

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(1) [1915] 1 K. B. 867, 868, 869.
(2) (1608) 7 Rep. 1a.
(3) [1902] A. C. 499.

The conditions of this character are sometimes called "domicil," which explains the statement already quoted from Mr. Hall; but by that phrase is not meant civil domicil—what Lord Lindley calls in the passage cited his "real domicil"—but a condition more easily acquired and lost, called by some of the text-writers "commercial" or "trade domicil"—"domicile in a peculiar sense, differing considerably from ordinary domicile, which is known as trade domicile in war, but is equally applicable to persons not engaged in trade": see Dicey's Conflict of Laws, 2nd ed., App. note 7, p. 741; Westlake's International Law, pt. ii., War, p. 54.

Civil domicil is such a permanent residence in a country as makes that country a person's home. Commercial domicil is such a residence in a country for the purposes of trade or otherwise as makes a person's trade or estate form part of its resources: see Hall's International Law, 6th ed. p. 491. To gain a civil domicil residence is required with an intention of making the country one's home. To gain a commercial domicil, residence with no intention of leaving shortly is sufficient, and time is the principal element in the domicil. "Time is the grand ingredient in constituting domicil," says Lord Stowell in *The Harmony* (3), and the whole judgment is worth consideration. Dr. Lushington in *The Aina* (4) defines the condition as one "where a neutral, after the commencement of war, continues to reside in the enemy's country for the purposes of trade." It is not

(1) (1812) 3 Camp. 245.
(2) (1854) 4 E. & B. 217.
(3) (1800) 2 C. Rob. 324.
(4) (1854) Spinks, 8, 10.

necessary here further to consider the numerous authorities bearing on the acquisition and nature of this "commercial domicil," for it is clear that Mr. Müller, by long residence and registration as an alien, had up to the day he left England such a domicil that he was not then an "alien enemy" in the view of the common law.

How does an enemy subject who has temporarily lost his enemy character by acquiring such a commercial domicil lose that domicil? A civil or real domicil can only be lost by complete abandonment in fact and intention of the domicil. When it is lost, if there is no other domicil acquired, the domicil of origin reverts. A commercial or trade domicil may be lost by intention to abandon it coupled with some overt act or step taken to effect the change, and leaving the country with no intention of immediate return, and with a sale of one's property therein, seems clearly to destroy the commercial domicil. Thus in *The President* (1) a natural-born English subject was American consul and trading at the Cape of Good Hope, then in the possession of the Dutch enemy, but was intending to return to America. Lord Stowell, treating him as an enemy, said: "A mere intention to remove has never been held sufficient, without some overt act. . . . . Something more than mere verbal declaration, some solid fact, shewing that the party is in the act of withdrawing, has always been held necessary" to divest enemy character. In *La Virginie* (2), where a Frenchman trading in America left it temporarily, shipped goods from a French colony, and returned to America, Lord Stowell, holding him an enemy, said: "it is always to be remembered, that the native character easily reverts, and that it requires fewer circumstances to constitute domicil" (i.e. his national domicil) "in the case of a native subject, than to impress the national character on one who is originally of another country."

I agree with the language of Arnould on Marine Insurance (9th ed. vol. i. s. 92, p. 130) in discussing alien enemies: "A national character, acquired in a foreign country by residence, changes immediately the party has left such country animo non revertendi; and this is especially the case if he be returning to his native country, sine animo revertendi. In such case the native domicil revives while he is yet in transitu, for it very easily reverts, and is re-acquired the moment the foreign domicil is abandoned." (Similar language is

(1) (1804) 5 C. Rob. 277, 280.

(2) (1804) 5 C. Rob. 98, 99.

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used in Dicey on Conflict of Laws, App. note 7, p. 744; Duer on Marine Insurance, vol. i. pp. 514—515; Hall's International Law, 6th ed. p. 493; Westlake's International Law, pt. i., Peace, p. 206.) This is indeed founded on the language of Lord Stowell in *The Indian Chief* (1): "The ship arrives a few weeks after his departure; and taking it to be clear, that the national character of Mr. Johnson" (born in the United States) "as a British merchant was founded in residence only, that it was acquired by residence, and rested on that circumstance alone; it must be held that from the moment he turns his back on the country where he has resided, on his way to his own country, he was in the act of resuming his original character, and is to be considered as an American: The character that is gained by residence ceases by residence: It is an adventitious character which no longer adheres to him from the moment that he puts himself in motion, bona fide, to quit the country, sine animo revertendi." This passage was approved by the House of Lords in *Udny* v. *Udny*. (2)

When then Mr. Müller left England on May 26 or 27, intending to go to Germany and having made arrangements to sell his house and furniture, I think it is clear that at any rate he lost the English commercial domicil he had acquired by residence in England with the permission of the Crown. There is no evidence that he had acquired any other character. What then was his character? In my view the original and fundamental rule of nationality provides the answer. Until he has acquired another trade domicil by residence or trade sufficient to establish such a domicil his national character, determined by allegiance, reverts, and he was a German, and therefore an alien enemy, the moment he left England. Lord Ellenborough in *Harman* v. *Kingston* (3) required proof that a man was an enemy "by birth or by domicil." If you can find no domicil his birth or allegiance settles the question. Otherwise a British subject is justified in trading with a German, wherever found, unless it can be proved that the German is resident or carrying on business in Germany, a position which, in view of the very various and dubious purposes for which a German may be at present found outside Germany, seems a very dangerous one.

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(1) 3 C. Rob. 20.

(2) (1869) L. R. 1 H. L. Sc. 441, 451, 454.

(3) (1811) 3 Camp. 150, 153.

I am of opinion, therefore, that Mr. Müller was on and before June 2, 1915, an alien enemy. If it had been necessary I should have been prepared to find that he had reached Germany on June 2. It is true that long ago Lord Kenyon called the plea of "alien enemy" "that odious plea": *Casseres* v. *Bell* (1); and Lord Ellenborough in *Harman* v. *Kingston* (2) said that "A defence of this sort which goes merely in disability of the person is to be made out by the strictest proof"; but I respectfully agree with Lord Davey's observation in the *Driefontein Case* (3) that, "the objection being one based on considerations of public policy affecting the Sovereign, his Courts should be held bound to take notice of the plaintiff's inability to sue," and to decide it with strictness against neither party, but on the ordinary rules of proof. I can see nothing strained in holding that a German who says he is going back direct to his native country and is known to have started has got there in less than five times the ordinary time of transit. And I doubt whether the position would be any better if Mr. Müller is only taken to have arrived after June 2, but before the time fixed for completion.

If Mr. Müller was an alien enemy on June 2, I think it is clear that, by the common law, to contract with him personally, though through an agent, for the sale of land in England was the offence of trading or commercial intercourse with the enemy. Perhaps selling land is not ordinarily called trading, though it is the trade of land companies; but selling English land to Germans must be against the spirit and the letter of the law, and the selling of English land by Germans seems to me the same. If Müller was one party to the contract it can make no difference that he contracted through an English agent. Lord Sumner, in giving the judgment of the Privy Council in *The Panariellos* (4), says: "Intercourse with an enemy subject, resident in the enemy country, is forbidden even though it takes place through his agent in the United Kingdom." The full Court of Appeal in *Maxwell* v. *Grunhut* (5) say: "It was obvious that the agent could have no greater right than his principal who, being an alien enemy, could not sue." Rowlatt J. in *Schmitz* v. *Van der Veen & Co.* (6) allowed an agent to recover who sold

(1) (1799) 8 T. R. 166, 167.

(2) 3 Camp. 150, 153.

(3) [1902] A. C. 499.

(4) 85 L. J. (P.) 116.

(5) 31 Times L. R. 79, 80.

(6) (1915) 84 L. J. (K.B.) 861.

goods as a principal in England for the best price he could get, accounting for a percentage of the excess over a minimum price to his principal in Germany. The learned judge took the view that the sale by principal to principal in England was in order; what the principal-agent did with the price was another matter, and he had consented to its being vested in the Public Trustee, which removed any objection as to the destination of the price during the war. It may be that a principal to a contract may sue though he is an agent for an alien enemy—that a trustee for an alien enemy may sue. *Brandon* v. *Nesbitt* (1) is to the contrary effect. There a broker in whose name a policy was effected for and on account of alien enemies was held by the Court not entitled to recover. *Flindt* v. *Waters* (2), cited by Rowlatt J., turns on a question of pleading, that only the general issue had been pleaded, and not a plea of alien enemy. The other trustee cases—*Daubuz* v. *Morshead* (3) and *Antoine* v. *Morshead* (4)—were both brought after the war on bills given during the war by English prisoners in France indorsed to enemies, and Gibbs C.J. treats them as an exception to the general rule in favour of English prisoners, who can only raise money during the war by discounting their bills with enemies: see Westlake's International Law, pt. ii., War, p. 51. I observe that Lord Parker in the *Daimler Case* (5) appears to treat the carrying on business by trustees on behalf of alien enemies as quite lawful, provided the enemies get no benefit till the end of the war. I am not aware of any authority for this, and I do not know that it was necessary for the decision of the case before the House. If correct, it will allow all the German businesses in this country to be carried on by trustees, though their owners, the cestuis que trust, are fighting against us, a procedure which, if legally correct, which I doubt, will very much startle public opinion. In my view the appointment of an English trustee or attorney during the war would be illegal as involving intercourse with the enemy, and any existing appointment would become illegal when the cestui que trust or principal became an alien enemy. I note that Parliament, in spite of Lord Parker's views, has by 5 & 6 Geo. 5, c. 105, s. 1, empowered the Board of

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(1) 6 T. R. 23.

(2) (1812) 15 East, 260.

(3) (1815) 6 Taunt. 332.

(4) (1815) 6 Taunt. 237.

(5) [1916] 2 A. C. 347.

Trade to prohibit all such business carried on by trustees for the benefit of alien enemies.

It is also suggested that under s. 46 of the Conveyancing Act, 1881, the holder of the power of attorney might convey in his own name and so the conveyance be effected from Englishman to Englishman. I do not find it necessary for my decision to determine this or the position of trustees, for in this case the oral contract is one made on June 2 by the auctioneer in the name of and by direct instructions from Müller, and the written document necessary for any enforceable contract is made with Müller, who, I have held, was then an alien enemy. If that was illegal as trading with the enemy, it need not be considered what would be the effect if the contract had been made and carried out in another way.

I am of opinion, therefore, that the contract was illegal at common law, and as the plaintiff did not know the defendant was an alien enemy at the time and repudiated the contract as soon as he knew, he has not such criminality as prevents him recovering the money paid, no part of the agreement having been performed : *Tappenden* v. *Randall* (1) ; *Kearley* v. *Thomson*. (2) This does not apply to the furniture, where the contract was completely executed, or to the costs of investigating title and appealing against the assessment, which are in the nature of damages.

I am not sure, however, that the same or a larger result might not be obtained in an action for rescission for concealment of a material fact. In *Carlish* v. *Salt* (3) Joyce J. states the law thus : "Upon consideration of the authorities, I am of opinion that the vendor of real estate is under a similar obligation" (namely, to disclose defects) "with respect to a material defect in the title, or in the subject of the sale, which defect is exclusively within his knowledge, and which the purchaser could not be expected to discover for himself with the care ordinarily used in such transactions." I am inclined to think the fact that the vendor was an alien enemy was a material defect in the title, which should have been disclosed, but it is not necessary to decide this.

If then the contract of June 2 would have been illegal at common law, and if, as I have held, it is immaterial that it was not hurtful

(1) (1801) 2 Bos. & P. 467.

(2) (1890) 24 Q. B. D. 742.

(3) [1906] 1 Ch. 335, 341.

to this country if the purchase-money was not paid over, the remaining question is whether the statutes and Proclamations have superseded the common law, and whether the contract can be justified under the statutes and Proclamations.

They are numerous and complicated and bear marks of considerable haste in drafting. The most material Proclamation is that of September 9, 1914, superseding an earlier one of August 12, 1914. It is apparently issued under the prerogative as a warning of things forbidden and a statement of things allowed. The latter may restrict the common law; the former, if not exhaustive, in my view does not so restrict the common law. I agree with Sargant J. in *Robson's Case* (1) that mere silence or omission in the proclaimed list of things prohibited is not enough to relieve from any prohibition at common law. Then follow two Acts of Parliament making a statutory offence with a statutory penalty: the Trading with the Enemy Act, 1914 (4 & 5 Geo. 5, c. 87), coming into effect on September 18, 1914, which I call the first Act, and the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12), coming into effect on November 27, 1914, which I call the second Act. Both Acts are to be construed together. The Acts appear to me to leave the common law unaffected, while they provide statutory remedies for the statutory offences created. Sub-s. 2 of s. 1 of the first Act makes it an offence under the Act to do anything which at common law constitutes an offence of trading with the enemy unless it is permitted under a Proclamation. Sub-s. 5 of the same section provides that where an act is an offence both under the Act and the common law the offender may be prosecuted under either, but not punished twice for the same offence.

But the definition clause (s. 14, sub-s. 2) of the second Act provides that no person shall for the purposes of the Act be treated as an enemy who would not be so treated under any Proclamation then in force. This sends us to the Proclamation of September 9, 1914, which defines "enemy" as meaning any person, of whatever nationality, resident or carrying on business in the enemy country, but not including persons of enemy nationality who are neither resident nor carrying on business in the enemy country. This apparently treats a German on his way back to Germany, but not

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(1) [1915] 2 Ch. 130.

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yet resident or carrying on business there, as not included in the term "enemy." In this I think the statutes and Proclamations are narrower than the common law, which in my opinion would penalize a contract made with such a German. If this is so under the Act and Proclamation, the contract at auction on June 2 was not within the 9th warning of par. 5 of the first Proclamation "not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy," for when the contract was entered into Müller was not an enemy within the meaning of the Proclamation. The power of attorney was made while Müller was in England. Acting on it after he left does not necessarily involve any intercourse or trading with Müller provided the money was not paid to him.

I come, therefore, to the conclusion that the only way in which the transaction can be attacked successfully is that under the common law the contract of June 2, being a financial transaction with Müller, a German then returning to Germany and having no residence or place of business in any other country, was trading with the enemy, but that by reason of the definition of "enemy" in the Proclamation incorporated in the statute this transaction is not a statutory offence.

I am not impressed with the argument that this transaction should be allowed, for otherwise the land of England would lie idle. If the Government think it right, any land held by an alien enemy can under s. 4 of the second Act be vested in the custodian by order of the Court, on the application of the custodian or any Government department, with power to the custodian to manage it. It may also under the Act of 1916 (5 & 6 Geo. 5, c. 105) be so vested by the Board of Trade in the custodian without any application to the Court. The Government have the power to prevent any land owned by alien enemies from remaining unprofitable; if they do not choose to use this power, it is not for private individuals to rectify their omission by dealing with the enemy. The history of this war has shown that leniency to the subjects of some belligerent nations in their private affairs is only abused by them in the interests of their country.

I am very much impressed by the public danger of a decision which, at a time when British subjects are being called upon to give up their businesses to serve their country, will enable alien German subjects resident in Germany, and perhaps fighting against this country, to carry on competing English businesses through trustees or agents, and to deal in the same way with English property. That Parliament has given statutory power to a Government department to stop such action by trustees supports my view. It is, I think, very dangerous to allow British subjects to speculate as to what dealings with Germans are not injurious to this country; the safer rule is to treat all dealings with alien enemies as forbidden, unless the Crown expressly sanctions them.

In my opinion, therefore, the appeal should be allowed, and the plaintiff should be granted a declaration that the contract of June 2, 1915, was by the common law of England illegal ab initio as being made with an alien enemy, and an order for the return of the deposit, with 5 per cent. interest from June 2, 1915, and costs here and below except so far as they were increased by the claim for furniture and costs and charges.

BRAY J. (after stating the facts). The contentions for the plaintiff were (*a*) that the Court ought to draw the inference that on June 2, the date of the contract, the defendant was residing in Germany and therefore an alien enemy; (*b*) that as soon as he became an alien enemy the power of attorney was revoked or ceased to have any force; (*c*) that the contract was void ab initio on the ground that, being made with an alien enemy, it was illegal; or (*d*) that if he was not an enemy on the date of the contract it was dissolved when he became an alien enemy before completion on the ground that he could not complete the purchase either personally or by his agent. As to the contention (*a*) the learned judge held that no such inference could be drawn, and he dismissed the action on that ground. I prefer not to decide the case on that ground, although the inclination of my opinion is that we ought not to differ from Eve J.'s decision. No doubt before the war a man intending to go to Germany via Flushing and shown to have left for Flushing by the Flushing boat on the evening of May 26 would be certain to arrive in Germany before June 2, and might be said to be residing there unless there was some change of intention on his part or something unusual had happened, but in times of war some delay is sure to occur. The

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Germans, I take it, do not admit any one into their territory without inquiries, and inquiries may cause more or less delay. I do not know what inquiries they make or what delays occur; I think it probable that he would arrive in Germany before June 2, but I feel I should be guessing, and guessing is not sufficient. It is said that if he had not arrived by June 2 he could have easily proved that fact. I do not think it would be so easy. He cannot come here and give evidence. His evidence cannot be taken on commission. A letter from him to say that he arrived there, say, on June 5, would not be evidence. On the other hand the plaintiff might be able to get evidence from Holland to say that he was seen to go by a certain train which would in the ordinary course arrive in Germany, say, on May 28, and that the German Government put no difficulties in the way of German subjects passing through the frontier. But there is no such evidence. For these reasons I think that I should have considerable hesitation in reversing Eve J.'s decision on this point.

It was argued that the defendant became an alien enemy the moment he embarked on the boat at Tilbury with the intention of going to Germany. I do not agree. The probability that he may become an enemy is not the same as becoming an enemy: see per Lord Halsbury in *Janson* v. *Driefontein Consolidated Mines*. (1) However, for the purpose of considering the other points I will assume that the defendant was an alien enemy on June 2. The next contention on the part of the plaintiff was that the power of attorney was revoked when the defendant became an alien enemy. No doubt if the fact that the defendant became an alien enemy made it unlawful for the attorney to sign the contract or complete the sale the contract would be void and it would be unnecessary to consider this point, but I understand the contention to be that the power of attorney was revoked by the mere fact that the defendant became an alien enemy, and that this was so whether the contract were lawful or unlawful: in other words, it was put as a separate point independent of the alleged illegality of the contract. I will consider this point first independently of s. 9 of the Conveyancing Act, 1882. I cannot understand why it should be said that the power is revoked. There was no change of intention on the part of the defendant. He gave the power of attorney to

(1) [1902] A. C. 494.

Mr. White in order that Mr. White or the auctioneers might make the contract on his behalf while he was in Germany and had so become an alien enemy. Death revokes a power of attorney because the grantor has thereby lost the power of forming an intention, and insanity for the same reason; marriage revokes it because a change of intention is presumed; and bankruptcy because a bankrupt cannot deal with his property or give any one authority to do so; but I fail to see any reason why the mere fact of becoming an alien enemy should revoke the power. I think, apart altogether from the Conveyancing Act, this contention on the part of the plaintiff fails. Then as to s. 9 of the Conveyancing Act, 1882. If this section applies at all to an alien enemy it is conclusive against the plaintiff on this point, because the power was made irrevocable for twelve months. It might possibly be contended that this section had no application at all where the grantor became an alien enemy, and that an exception should be read into the section as was done in the case of s. 6 of the Naturalization Act, 1870—see *Rex* v. *Lynch* (1)—and s. 14 of the British Nationality and Status of Aliens Act, 1914, in the recent case of *Ex parte Freyberger*. (2) I prefer to hold that, apart from this section, this power of attorney was not revoked. The real question we have to consider is whether it became unlawful for Mr. White or the auctioneers (it matters not which) to make this contract on behalf of the defendant on June 2, the defendant then being, as I have assumed, an alien enemy. No doubt this is an important and difficult question. First, it seems to me that Mr. White, under his power, could through the auctioneers sell this property, execute the transfer, and complete the sale without communicating in any way with the defendant. No intercourse with the defendant would be necessary. Mr. White had undertaken with the Public Trustee to deal with the money as directed. The defendant, if he could not touch the money till after the war, would derive no benefit from the contract till after the war. Lord Parker in *Daimler Co.* v. *Continental Tyre and Rubber Co. (Great Britain)* (3) said: "The prohibition against doing anything for the benefit of an enemy contemplates his benefit during the war and not the possible advantage he

(1) [1903] 1 K. B. 444.

(2) [1917] W. N. 103; since reported [1917] 2 K. B. 129.

(3) [1916] 2 A. C. 347.

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may gain when peace comes." The defendant being the original lessee would remain liable for the rent, and although he would be entitled to be indemnified by the purchaser, yet he could not during the war enforce that right: see *Halsey* v. *Lowenfeld.* (1) Then is it against public policy that an alien enemy having an interest in real property should be at liberty to sell it if this involves no intercourse and the alien enemy cannot receive the price? How could it be a detriment to the State? Surely it would be a detriment to the State if he could not. If he cannot sell it he cannot let it, and as far as I can see he could not even engage a caretaker to look after it or employ a person to keep it in repair. No doubt the Public Trustee could intervene, but he was not bound to do so, and he would probably hesitate to do so, as he would render himself liable to the landlord to pay the rent and observe the covenants. It seems to me that it would be to the interest of the State that the alien enemy should be able to sell his property if it can be done, as I think it could be done in this case, without intercourse with and without benefiting the enemy.

Then how do the authorities stand? What is the common law as shown by the authorities? There are no authorities with reference to contracts for the sale of interests in real property, and as until 1870 aliens could not lawfully hold land, the judges in deciding cases prior to that date upon other contracts could not have had in contemplation contracts for the sale of land. This must be remembered; but still the principles on which the earlier cases were decided must be regarded so far as they are applicable to contracts for the sale of lands, and the authorities must therefore be examined. These authorities, including the important case of *The Hoop* (2), have been recently considered in this Court. In *Porter* v. *Freudenberg* (3) Lord Reading says: "Ever since the great case of *The Hoop* (2) the law has been firmly established as pronounced in the judgment of Lord Stowell (then Sir William Scott) that one of the consequences of war was the absolute interdiction of all commercial intercourse or correspondence by a British subject with the inhabitants of the hostile country except by permission of the Sovereign. (See also *Potts* v. *Bell*, per Lord Kenyon C.J. (4)) This branch of law was again considered as a result of the Crimean War, and Willes J., in delivering the judgment of the Court of Queen's Bench in *Esposito* v. *Bowden* (1), said : 'It is now fully established that the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country and that such intercourse, except with the licence of the Crown, is illegal.' This law was founded in earlier days upon the conception that all subjects owing allegiance to the Crown were at war with the subjects of the State at war with the Crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy State by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy State" ; and again (2) : "The rule of law suspending the alien enemy's right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy. As was said by Bailhache J. in *Robinson & Co.* v. *Continental Insurance Co. of Mannheim.* (3) 'To hold that a subject's right of suit is suspended against an alien enemy is to injure a British subject and to favour an alien enemy and to defeat the object and reason of the suspensory rule.' In our judgment the effect would be to convert that which during war is a disability, imposed upon the alien enemy because of his hostile character, into a relief to him during war from the discharge of his liabilities to British subjects." In *Halsey* v. *Lowenfeld* (4), where the question was whether the liability of an alien enemy lessee for rent accruing due after the outbreak of war under a lease granted before the war was thereby extinguished or suspended, Lord Reading says : "The prohibition of intercourse between persons in this country and alien enemies is based on public policy, and it would indeed be a strange result if a law so founded was held to apply to relieve an alien enemy of obligations incurred before the war in respect of property of which he is not deprived by the Crown ; for the property of alien enemies is at common law subject to confiscation by the Crown in virtue of the Royal prerogative: see Hale's Pleas of the Crown, vol. i. p. 95; *Porter* v. *Freudenberg*. (1) But if the Crown refrains from exercising the right to confiscate and allows the alien enemy to continue in ownership of the property, he holds it subject to all its obligations. It would be manifestly absurd that he should derive the advantage of holding the property without liability to perform the obligations incident to his right of ownership." In *Robson* v. *Premier Oil and Pipe Line Co.* (2), where the question was whether alien enemies were entitled to exercise the right of voting, Pickford L.J., in delivering the judgment of the Court, says: "The prohibition of intercourse was stated as extending to much wider limits by Lord Stowell in *The Hoop* (3) and *The Cosmopolite* (4), and reference was made in the judgment to writings of jurists on the subject. The statement there contained has been followed in several cases in the Courts of this country, and also in America by such great authorities as Story and Kent"; and again: "The prohibition of intercourse with alien enemies rests upon public policy, and we can see no ground either on principle or authority for holding that a transaction between an alien enemy and a British subject which might result in detriment to this country or advantage to the enemy is permissible because it cannot be brought within the definition of a commercial transaction"; but later on the same page he expressly refrained from deciding whether the principle extended to intercourse which could not possibly tend to detriment to this country or advantage to the enemy.

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(1) [1916] 2 K. B. 707.
(2) 1 C. Rob. 196.
(3) [1915] 1 K. B. 867.
(4) 8 T. R. 561.

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(1) 7 E. & B. 779.
(2) Ibid. 880.
(3) [1915] 1 K. B. 155, 159.
(4) [1916] 2 K. B. 707, 713.

The result of the cases that I have referred to seems to be that in order to determine whether a contract such as this with an alien enemy is illegal and void it is necessary to answer the following questions: (*a*) Does the contract involve intercourse with an alien enemy? (*b*) Would it tend if valid to the detriment of this country or to the advantage of the enemy? (*c*) Is it against public policy? For the reasons I have already mentioned, having regard to the facts of this case, my answer to each of these questions is No. Therefore, so far as the common law is concerned, this contract of June 2 was, in my opinion, neither illegal nor void.

(1) [1915] 1 K. B. 857, 867.
(2) [1915] 2 Ch. 124, 135, 136.
(3) 1 C. Rob. 196.
(4) 4 C. Rob. 8.

The remaining question is whether it was prohibited by any Proclamation. The Proclamation of September 9, 1914, par. 5, provides as follows: "From and after the date of this Proclamation the following prohibitions shall have effect . . . . and We do hereby accordingly warn all persons resident, carrying on business or being in Our Dominions . . . ."; and by sub-par. 9: "Not to enter into any commercial, financial or other contract or obligation with or for the benefit of an enemy"; and then at the end of par. 5: "We do hereby further warn all persons that whoever in contravention of the law shall commit, aid, or abet any of the aforesaid acts, is guilty of a crime and will be liable to punishment and penalties accordingly." Is this contract a contract with the enemy within the meaning of sub-par. 9? I think not. I do not think, having regard to the recitals in the preamble, that it applies to a contract like this, made not directly with an alien enemy, but through an agent in this country who had received his authority before the vendor became an alien enemy and who could carry through the transaction without any intercourse with the alien enemy. I think if it had been intended to prohibit a transaction of this kind much clearer language would have been used. I think we ought not to read the sub-section as going beyond the common law or as creating a new crime, which it would do if it went beyond the common law, unless the words used show a clear intention that it should do so. Sect. 4 of the Trading with the Enemy Amendment Act, 1916, seems to contemplate that an agent may lawfully manage an alien enemy's real property, and if he may manage it I do not see why he should not sell it, provided that he can do so without intercourse and without benefiting the enemy.

In my opinion the contention that the contract was unlawful fails and the appeal should be dismissed.

LORD COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitors for appellant: *Langlois, Harding, Warren & Tate.*
Solicitors for respondent: *Whites & Co.*

W. I. C.

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Jan. 31; Feb. 1; May 9, 10.

In re FRIED KRUPP ACTIEN-GESELLSCHAFT.

[1915 J. 94.]

War—Trading with the Enemy—Payment of Debts due from Enemy—Interest—German Ordinance prohibiting Payment of Interest.

A German ordinance of September 30, 1914 (war between England and Germany having been declared on August 4, 1914), forbade transmission of funds to Great Britain and Ireland or British Colonies and foreign possessions, and provided that the date for satisfaction of claims relating to property in favour of persons or corporate bodies having their domicil or place of business in those areas was to be deemed postponed till further notice, and proceeded: "No interest can be claimed in respect of the period during which the postponement continues":—

Held, that the ordinance was not part of the ordinary German law, and, so far as it cancelled the liability for interest, would not be recognized by English Courts.

On June 12, 1915, a vesting order under the Trading with the Enemy Amendment Act, 1914, s. 4, relating to the above-named company, an enemy, was made at the instance of J. Wild & Co., of Middlesborough, and an inquiry was directed as to what debts, if any, were owing by the enemy company to persons within the United Kingdom not being enemies within the meaning of the Act. By an order of November 26, 1915, it was ordered that the custodian should out of moneys in his hands pay to creditors, including Messrs. Wild, the amounts scheduled in the order. While the Master was completing his certificate an application was made as to allowance of interest, and on June 1, 1916, Younger J. made an order directing the Master not to compute interest upon any debts which by law carried no interest, and he held that the interest on debts which by contract carried interest ought to be allowed, and he directed the Master to ascertain whether the debt of Messrs. Wild carried interest under the contract. (1) It was common ground between the parties that the contract fell to be interpreted, and the rights of the parties to be regulated, by German law, and that under German law interest at the rate of 5 per cent. per annum was payable from the date of maturity, even in the absence of any agreement to that effect. The Master made his certificate, finding that the debt of Messrs. Wild carried interest by contract, and allowed it accordingly. The enemy company then issued a summons to vary the certificate by disallowing the interest. The summons was adjourned into Court. On September 30, 1914, a German ordinance had been issued by the Federal Council by virtue of a power conferred by an imperial statute relating to economic matters of August 4, 1914, of which (so far as material) a translation follows. Paragraph 1 forbade transmission of funds to "Great Britain and Ireland or to the British Colonies and foreign possessions." Paragraph 2: "The date for the satisfaction of any claims relating to property which either have already arisen or will arise in the future in favour of persons or corporate bodies having their domicil or principal place of business in any of the areas specified in paragraph 1 is to be deemed postponed until further notification as from July 31, 1914, or if the date for satisfaction is a later date as from that date. No interest can be claimed in respect of the period during which the postponement continues. All legal consequences which according to the existing rules of law have arisen by reason of the failure to satisfy any such claim between July 31, 1914, and the date of the coming into force of this ordinance are to be treated as if they had not arisen. The postponement operates also against any assignee of the claim unless the assignment was made before July 31, 1914, or in the case of the assignee being domiciled or having his principal place of business within the German Empire before the coming into force of this ordinance. A person entitled to a right of subrogation by reason of having himself satisfied the claim is deemed to be in the same position as an assignee."

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(1) [1916] 2 Ch. 194.

Compston, K.C., and *Dighton Pollock*, for the enemy company. When the vesting order was made, up to which time there was no fund out of which anything could be paid, the German ordinance was in existence postponing payment of the debt, and the debt was not to carry interest. The debt is admitted and payment of it is not objected to; but payment of interest which the ordinance prohibits is objected to. The authorities do not say it is no part of private international law to recognize the war emergency legislation of an enemy. *Wolff* v. *Oxholm* (1) was a case of confiscation and is different from this. It cannot be said that the prohibition is a matter of procedure analogous to s. 4 of the Statute of Frauds. The ordinance is part of the German law of to-day, it applies all over Germany, and it is not against natural justice. Interest can only be claimed under German law, and, as that law has forbidden it, it cannot be got.

Austen-Cartmell, for the custodian. The ordinance is not a mere moratorium. It is directed only against enemies; it does not affect neutrals. The custodian submits to direction by the Court.

Clauson, K.C., and *Percy Wheeler*, for J. Wild & Co. The other side is wrong for several reasons. First, this legislation as regards interest is confiscation and not conformable to the usage of nations, and the Court will not recognize it as part of private international law which English Courts regard as part of English municipal law: *Wolff* v. *Oxholm* (1); *Henderson* v. *Henderson*. (2) Secondly, it is legislation of a penal character which will not be enforced in this country. *Huntington* v. *Attrill* (3); *Folliott* v. *Ogden* (4); *Ogden* v. *Folliott* (5); Westlake's Private International Law, 5th ed. p. 431. The ordinance is expressly intended to put British subjects at a disadvantage, imposing a penalty on German subjects who disobey it, being passed for the benefit of the German State and aimed at crippling the enemy. The English Court, representing the King and administering British justice, will not allow itself to be made the engine of enforcing penal legislation of another country, which is in reality an attack on the King. It will not regard foreign legislation imposing a personal disability upon a limited body of persons, except in the case of such recognized disabilities as, e.g., infancy. Thirdly, the principle upon which German law is applied in this case is that the parties contracted to be governed by German law. It is a question of intention: *In re Missouri Steamship Co.* (6) It is monstrous to imply into the contract an intention that the English party would be bound by a penal provision, not in existence at the time, and not being part of the general law of Germany, and to be applicable against him and not against the other party. Even if the parties must be taken

(1) (1817) 6 M. & S. 92.
(2) (1844) 6 Q. B. 288, 298.
(3) [1893] A. C. 150, 155.
(4) (1789) 1 H. Bl. 123, 135.
(5) (1790) 3 T. R. 726, 733.
(6) (1889) 42 Ch. D. 321, 341.

to have contemplated some alteration of the general law, it is not every alteration of the law which they contemplated, and this alteration amounts to nothing more than saying that for a certain period the German Courts will not recognize the payment of interest, and is a mere matter of procedure, lex fori. The Master arrived at a correct conclusion.

Dighton Pollock in reply. As to intention, all that can be said is that the parties agreed to be governed by German law, and it cannot be said one party intended one thing and one another. As to confiscation, this is not a case of taking another country's subject's property: it is only suppressing payment of interest; no claim can be made for it. The interest does not go to the State. The suppression is not technically confiscation. Nor is the ordinance penal within the authorities.

Cur. adv. vult.

May 10. YOUNGER J. This is a summons by Fried Krupp Actien-Gesellschaft, whom I shall call Messrs. Krupp, to vary the Master's certificate by disallowing interest which he has certified to be due and payable to J. Wild & Co., the respondents to this summons, in respect of moneys which are certified to be due to them under a contract between themselves and Messrs. Krupp. That contract, it is common ground between the parties, falls to be interpreted, and the rights of the parties thereunder to be regulated, by German law. The dates for payment of the moneys payable thereunder by Messrs. Krupp are either fixed by the terms of the contract itself or they are capable of being so fixed. It is further agreed that under the German law interest upon such payments from the dates which were so fixed, or capable of being so fixed, ran at the rate of 5 per cent. per annum, and that such interest is payable upon a principle which is stated in the following terms by Dr. Schuster, whose opinion in the matter is accepted by both parties for this purpose as defining the German law on the subject: "Where a claim arises under a mercantile transaction between mercantile traders, interest at the rate of 5 per cent. per annum is payable from the date of maturity, even in the absence of any agreement to that effect." The Master accordingly computed as allowable interest on Messrs. Wild's claim, carrying into effect in so doing the direction which was given to him in the following terms by the judgment which I gave in this case on June 1, 1916 : "As to debts which by contract with the enemy carry interest, the interest is, as against the enemy, part of the debt just as much as the principal. In the present case, where the funds are ample for payment of all admitted claims in full, and where, therefore, the rights of other creditors do not intervene, the Master will compute interest at the rate fixed by the agreement under which the debt arises. Whether the debt of Messrs. Wild & Co. does or does not carry interest the Master will ascertain and determine." (1) The Master has determined that that debt does carry interest, but it is now objected that interest is not payable, and that it is not payable by reason of a German ordinance which was passed on September 30, 1914, and which, as it has been translated by Dr. Schuster, is in the following terms : After paragraph 1 of the ordinance, which forbids transmission of funds to "Great Britain and Ireland or to the British Colonies and foreign possessions," paragraph 2 proceeds as follows : [His Lordship read the paragraph and continued :]

That ordinance, Dr. Schuster informs the Court, is not in any sense part of the general German law. Under the rules of that system the outbreak of war does not "in itself affect contractual relations then subsisting between Germans and persons residing or carrying on business in any country at war with Germany," and Dr. Schuster adds—and I accept his statement—that it was before the war held universally in Germany and generally on the continent of Europe that article 23 (*h*) of the Hague Convention concerning land warfare made it unlawful for any country being a party to that Convention to declare any right of action unenforceable or suspended by reason of the outbreak of war. And this ordinance, as well as similar German ordinances enacted at the same time and made applicable to France and Russia, have this feature common to all, that their intention plainly is to penalize particular classes of persons, and incidentally to injure the enemy countries to which these persons belong. The rule of German law above stated which prescribes the payment of interest in the case of contracts between mercantile traders operates, it need hardly be said, indifferently for or against each party to the contract,

(1) [1916] 2 Ch. 203.

but the suppression of interest introduced by these ordinances operates against the foreign contracting party only. If under the present contract, for example, Messrs. Wild instead of Messrs. Krupp had been the purchasers of ore they would, notwithstanding the ordinance, still remain liable in Germany not only for its price but for interest on it, and, as Dr. Schuster points out, Messrs. Krupp could at any time during the war have obtained in Germany judgment against Messrs. Wild for that price and interest, and could have enforced the judgment when obtained against any property of theirs in Germany. No objection can of course be taken on principle to any German enactment which would prohibit during the war any payment of money by a German to any person resident or carrying on business in enemy country, but the cancellation of all liability for agreed interest during suspense of payment, and that for the benefit of one party to the contract alone, stands on quite a different footing. The German debtor has the use during the period of suspension of the money he is prohibited from paying, and it is difficult to find any just reason why he should in these circumstances after the war be relieved of his contractual liability to pay interest when he is not relieved of the liability to repay the principal. In truth, however, there is no justice in the matter; the relief is interested and partial, as is sufficiently shown by the fact that it is not made reciprocal.

In that state of things it appears to me impossible that any Court in this country can recognize a German ordinance of this description, and there is, I think, a choice of grounds on which refusal to do so can properly be based. It may, I think, first of all be said that such an ordinance as this is no part of the general German law, by which the parties to this contract alone agreed to be bound. And even if such an ordinance must be treated as part of that law, it may, I think, properly be held that no such essentially one-sided development of the system could have been within the contemplation of either party to the contract at the time when they entered into it and agreed that their rights thereunder were to be regulated by German law. But, further, this ordinance, with its marked bias in favour of German nationals as against British subjects, can, in my opinion, create in this country no disability upon a person against whom its provisions are directed, and the language of Lord

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Ellenborough in *Wolff* v. *Oxholm* (1) may, with the necessary modifications, justly be applied to it, so far as it operates to extinguish all German liability for conventional interest, as being one which is not conformable to the usage of nations, and which, therefore, Messrs. Wild could not expect, and which neither they nor we are bound to regard. Whatever ground of decision is chosen, it is, I think, clear that in this Court Messrs. Wild's debt carries interest unaffected by the ordinance, and that accordingly this summons must be dismissed.

Solicitors: *Nicholson, Graham & Jones; Coward & Hawksley, Sons & Chance; Roney & Co.*

A. L.

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May 8, 25.

In re TH. GOLDSCHMIDT, LIMITED.

[1917 T. 313.]

War—Trading with the Enemy—Company—Business directed to be wound up—Controller—Power to make Calls—"Assets of the business"—Trading with the Enemy Amendment Act, 1916 (5 *&* 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-ss.* 2, 3.

"Assets of the business" in sub-s. 3 of s. 1 of the Trading with the Enemy Amendment Act, 1916, does not include a company's uncalled capital.

A controller, appointed by the Board of Trade under the Trading with the Enemy Amendment Act, 1916, to conduct the winding up of a company's business in the United Kingdom directed by the Board to be wound up under that Act, cannot be invested by the Board with power to make a call upon the shareholders of the company for the purpose of putting himself in funds to discharge the debts of the business and the costs, charges, and expenses of and incidental to its winding up.

In re W. Hagelberg Actien-Gesellschaft [1916] 2 Ch. 503 and *In re Kastner & Co.* [1917] 1 Ch. 390 applied.

In June, 1916, a controller was appointed by an order of the Board of Trade, under the Trading with the Enemy Amendment Act, 1916, to conduct the winding up of a business carried on in the United Kingdom by the above-named company. The order purported to confer on the controller a power to settle a list of contributories and to make calls and to adjust the rights of the contributories among themselves. The debts of the business were in excess of assets of the business which the controller had in hand, but the company had share capital not fully called up, and the controller accordingly in April, 1917, made a call on the shares of two enemy shareholders (who held practically all the shares) for the amounts unpaid on them. Property of the two shareholders being in the hands of the Public Trustee as custodian, the controller took out a summons for payment by the custodian to him of the amounts of the call.

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(1) 6 M. & S. 92.

Gore-Browne, K.C., and *Sheldon*, for the controller. The powers of the Board of Trade under s. 1, sub-s. 2, of the Trading with the Enemy Amendment Act, 1916, are such that it can confer on the controller authority to call up unpaid capital. It may confer "such powers as are exercisable by a liquidator in a voluntary winding up of a company." Those words include a power to make calls. Calls are one of the most important matters in the view of a voluntary liquidator. It would be strange if sub-s. 2 did not enable the controller of the business of any individual, partnership, or company to get in any money which that individual, firm, or company is liable to contribute for the purposes of the business being wound up. Moreover, uncalled capital is an "asset of the business" within sub-s. 3 and distributable thereunder. Even if it is not, it may be administered under sub-s. 2. What is an asset of the business is a question of fact in every case. Uncalled capital is especially an asset of the business where there is only one business carried on by the company.

Austen-Cartmell, for the Board of Trade and the custodian. The true view is that it is a question of fact in each case whether uncalled capital is an asset of the business which is being wound up and for the purpose of the winding up—the "fact" being whether there is any other business which the company is carrying on. The converse—that every creditor of the company is a creditor of the business—is not admitted.

Cur. adv. vult.

May 25. YOUNGER J. This summons, which is taken out in the matter of the Trading with the Enemy Acts, 1914 and 1916, and in

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TH. GOLDSCHMIDT, LIMITED, *In re.*

the matter of Th. Goldschmidt, Limited, by the controller appointed by the Board of Trade to conduct the winding up of the business carried on in the United Kingdom by that company, asks for an order that the Public Trustee do out of moneys and property in his hands as custodian under the above-mentioned Acts belonging to Karl Goldschmidt, an enemy within the meaning of those Acts, raise and pay to the applicant as controller the sum of 1872*l.*, being the amount due from Karl Goldschmidt in respect of a call of 15*s.* per share made by the applicant as controller, dated April 4, 1917, upon 2496 shares of the company held by Karl Goldschmidt; and by paragraph 2 asks for a similar order in respect of the same number of shares held by Hans Goldschmidt. The claim of the controller can only be established if it be determined in his favour that the call made by him upon these enemies was valid; in other words, at the root of the matter lies the important general question whether a controller, appointed by the Board of Trade under the Act of 1916 to conduct the winding up of the business of a company in the United Kingdom directed by the Board to be wound up under that Act, can be invested by the Board with power to make a call upon the shareholders of the company for the purpose of putting himself in funds to discharge the debts of the business and the costs, charges, and expenses of and incidental to its winding up. In the present case these debts, with an estimated sum of 150*l.* for costs, charges, and expenses, amount to 4645*l.* 3*s.* 2*d.* Towards meeting them the controller has in hand a sum of 213*l.* 8*s.* 1*d.* only, and there are no further assets of the business in the strict sense of these words out of which these debts can be met. The company has, however, a substantial share capital of 5000*l.* divided into 5000 shares of 1*l.* each. On each of these shares the sum of 5*s.* only has been paid up: 2496 of the shares are registered in the name of Karl Goldschmidt, a like number in the name of Hans Goldschmidt, and substantial property of these two enemies is vested in the custodian. It is obvious that the uncalled liability upon these shares is a convenient fund to resort to for the purpose proposed if resort to it can be had by the controller, and by the order of the Board of Trade of June 2, 1916, which directed that the business in the United Kingdom of Th. Goldschmidt, Limited, should be wound up and appointed the applicant, Mr. Taylor, controller to control and supervise the carrying out of the order and to conduct the winding up of the business, the Board did indeed purport to confer upon him the power to settle a list of contributories and to make calls and adjust the rights of the contributories amongst themselves. In pursuance of that power Mr. Taylor on April 4, 1917, made a call of 15*s.* on the shares of the Messrs. Goldschmidt. Was that call valid ?

I have already in *In re W. Hagelberg Actien-Gesellschaft* (1) and *In re Kastner & Co.* (2) considered at length the scope and purpose of s. 1 of the Trading with the Enemy Amendment Act, 1916. The soundness of these decisions was not questioned upon this summons either by Mr. Gore-Browne on behalf of the controller or by Mr. Austen-Cartmell on behalf of the Board of Trade ; and the principle upon which they proceeded, if it be correct, has an important bearing upon the question which now arises for decision. These cases show that a business with which under the Act the Board of Trade may deal, either by prohibiting it from being carried on except for the purposes and subject to the conditions specified in the order of the Board or by requiring it to be wound up, is treated by the Act as an entity separate and distinct from any other property, whether in the United Kingdom or abroad, and from any other business not in the United Kingdom, of the person, firm, or company owning or controlling it ; that, accordingly, it is only the debts of the business, as distinct from the debts of such person, firm, or company irrespective of the business, that under the Act are to be paid ; and it is only the assets of the business, as distinct from the general assets of that person, firm, or company, that are made, so far as the Act is concerned, available for their discharge. As it is the purpose of the Act either to curtail or destroy businesses which are obnoxious to it, the creditors of the business are alone provided for, and the assets of the business are alone taken in hand to provide for these creditors. True, these assets comprise all the assets of the business, whether subject to charges or not, for otherwise the avowed purpose of the Act might fail to have complete effect, but they do not comprise any assets except those which can be properly included in the description assets of the business. Further, a company owning such a business is not placed in liquidation by virtue of an order under the Act directing the business in the United Kingdom to be wound up. On the contrary, the Act expressly empowers the Board of Trade to present a petition for the winding up of the company by the Court, enacting in s. 1, sub-s. 7, that an order under the Act shall be a ground on which the company may be wound up by the Court. Too much importance, therefore, must not be attached to the fact that the language of liquidation is copiously employed in the section. Indeed, it is mainly in connection with the controller, whose possible powers are described by reference to those exercisable by a liquidator in a voluntary winding up of a company, that that language is used. But the existence of a controller is no necessary part of the machinery for the winding up of a business contemplated by the Act. In a voluntary liquidation of a company s. 186 (ii.) of the Companies (Consolidation) Act, 1908, requires that a liquidator shall be appointed, but the appointment of a controller under this Act is purely permissive. Sect. 1, sub-s. 2, says " Where the Board of Trade make any such order they may at the same time or at any time subsequently appoint a controller to control and supervise the carrying out of the order and, if the case requires, to conduct the winding up of the business." No doubt in most, if not in all, cases of winding up a controller is appointed, but the fact that the appointment is permissive and that the appointment, if made, has no necessary reference to the business of a company—for the business may be that of a firm or individual—are both circumstances which tend to confirm the view, otherwise, I think, apparent from the Act, that it is s. 1, sub-s. 3, and not s. 1, sub-s. 2, which is the governing sub-section by reference to which this present question must be determined. Sub-s. 3 is as follows: " The distribution of any sums or other property resulting from the realisation of any assets of the business, whether those assets are realised as the result of an order requiring the business to be wound up or as the result of an order prohibiting or limiting the carrying on of the business, shall be subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up, and those assets shall, so far as they are available for discharging unsecured debts, be applied in discharging such debts due to creditors who are not enemies in priority to the unsecured debts due to creditors who are enemies; and any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Board of Trade may direct." It appears from that sub-section, which, be it observed, says nothing about a controller, that the only properties which can be dealt with are "any sums or other property resulting from the realisation of any assets of the business, whether those assets are realised as the result of an order requiring the business to be wound up or as the result of an order prohibiting or limiting the carrying on of the business." Do these assets include a company's uncalled capital? I think not. They are, I think, clearly not wide enough to include any moneys, not being capital employed in the business, which, as between individual owners of the business and their creditors, these owners could, outside the Act, be compelled to provide in order to meet their business debts; and I can see no ground on which these words can be extended to include a company's uncalled capital, which is, I think, clearly an asset of the company, and no more an asset of any business of the company than would be the outside property of individual owners if the business belonged to them.

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(1) [1916] 2 Ch. 503.

(2) [1917] 1 Ch. 390.

Moreover, in the interests of such a company's general creditors it is the barest justice that this distinction, if on the language of the Act it can properly be taken, should be rigidly maintained. For, as was pointed out in *In re W. Hagelberg Actien-Gesellschaft* (1), sub-s. 7 of s. 1 not only prevents a creditor of such a company from asserting his rights against the assets of the business, but it prevents him, without the leave of the Board of Trade, from taking in this country any steps at all against the company and its other property to recover payment of his claims against it. It is bad enough that the business assets should be withdrawn from these general creditors' claims and that their right to make their debtor's other assets available to meet their demands should be placed in suspense. This may well be submitted to as being necessary for the proper working of the section and for attaining its main purpose. But it would indeed be hard upon these creditors if during that period of suspense, and for no purpose of the Act so far as it provides for the destruction or limitation of obnoxious businesses, general assets of

(1) [1916] 2 Ch. 503.

the company should also be appropriated to meet exclusively the claims of business creditors who, as against their debtor, stand in no better position than those whose rights are delayed.

Now, is it a sufficient answer to all these considerations that the terms of s. 1, sub-s. 2, and the powers which the Board of Trade may under that sub-section confer upon a controller are wide enough to include such a power to make calls as has in the present case been given? I think not. There being no liquidation and no contributories of this company at present, the power conferred cannot in terms be justified, but a power to make calls upon the members would, I think, equally be outside the sub-section. I doubt whether the powers there by reference contained extend beyond those powers referred to in s. 186 (iv.) of the Companies (Consolidation) Act, 1908, which are the powers detailed in s. 151 of the statute and might readily be made applicable to the winding up or conduct of a business, whether of a firm, or of an individual, or of a company. And I greatly doubt whether s. 186 (v.), from which the powers conferred upon Mr. Taylor by the Board's order are clearly taken, has any application at all, remembering, as I do, that the company is not in liquidation, that the powers in that sub-section can have no reference to a firm or individual, and that the other subjects dealt with in the sub-section are expressly and differently provided for in s. 1, sub-s. 3, of this Act of 1916. I prefer, however, to base my decision on the more general ground that such vague words of reference to powers which may or may not be conferred upon an officer who need not be appointed at all, and which must be capable of being applied to an individual or a firm as much as to a company, cannot affect or extend the meaning of the expression " assets of the business " with which this section of the Act is dealing, in which expression the uncalled capital of this company is not, I think, included.

Solicitors: *Sanderson, Adkin, Lee & Eddis; Solicitor to the Board of Trade.*

A. L.

In re FR. MEYERS SOHN, LIMITED.

[1917 F. 678.]

YOUNGER J.

1917

May 8, 25

War—Trading with the Enemy—Company—Business directed to be wound up—Controller—Power to distribute Surplus Assets—Trading with the Enemy Amendment Act, 1916 (5 *&* 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-s.* 3.

Where, under the Trading with the Enemy Amendment Act, 1916, the Board of Trade orders the winding up of a company's business and appoints a controller, and the company is not in liquidation, the controller cannot be empowered by the Board to distribute assets in his hands, so far as they are not required for payment of the debts of the business and the costs of the winding up, among the shareholders of the company.

THE facts were stated by Younger J. as follows: In this case by an order of the Board of Trade of March 2, 1916, the business carried on by the above-named company in the United Kingdom was ordered to be wound up, and Mr. Alfred Page was appointed controller to control and supervise the carrying out of the order and to conduct the winding up of the business. Amongst the powers conferred upon the controller by that order was a power, as in the previous case (1), to settle a list of contributories and to make calls and adjust the rights of contributories amongst themselves. The company at the date of the order had a share capital of 60,000*l.* divided into 5000 preference and 55,000 ordinary shares of 1*l.* each. The company's business was that of sugar brokers and dealers and agents for sugar refineries. It was formed to acquire a business which had been previously carried on at 26, Mincing Lane, in the City, under the style of Fr. Meyers Sohn, and it continued such business. The company had only one business, namely, that carried on in the city of London. Its assets were partly in England and partly in Germany, and the liabilities were partly to creditors in England and partly to creditors in Germany; but the German assets and liabilities were all in connection with the company's English business. All the British assets of the business have been realized. After payment of all creditors except those in Germany these assets amount to about 26,000*l.* The German assets of the business not in the hands of the controller amount to about the same sum. All the preference shares are held by Dr. Meyer, a German resident in Germany; a large number of the ordinary shares is also held in Germany. There will undoubtedly ultimately be available a large sum in respect of surplus assets, but the company is not in liquidation. Difficult questions accordingly present themselves as to the distribution of these assets, having regard to the existence both of British and German property and of British and German creditors and shareholders. For the present purpose, however, it is necessary only to decide whether in such a case as this, where the company is not in liquidation, the assets in the hands of the controller, so far as they are not required for payment of the debts of the business and the costs of the winding up, are divisible among the shareholders at all, or whether they must be held by the controller for and on account of the company or its assigns.

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(1) *In re Th. Goldschmidt, Ld.*, ante, p. 194.

Gore-Browne, K.C., and *Wilfrid Hunt*, for the controller. The Board of Trade can, under s. 1, sub-s. 3, of the Trading with the Enemy Amendment Act, 1916, direct distribution of the surplus assets of the business among the company's shareholders, although the company is not in liquidation. There is sufficient in the Act to override the general rule against distribution among contributories. There is nothing in the Act that says liquidation supersedes controllership. There is no reason why both should not go on together. The controller remains the dominant person for the purposes for which he was appointed. There can be no liquidation unless the Board of Trade assents: sub-s. 7. The powers exercisable by a liquidator in a voluntary winding up which are referred to in sub-s. 2 must be those conferred by clauses (iv.) and (v.) of s. 186 of the Companies (Consolidation) Act, 1908, which in terms include the adjustment of the rights of contributories inter se. If the controller is not entitled to deal with the claims of shareholders, the benefit of sub-s. 4 may be lost in the case of companies, which would be a great disadvantage.

Austen-Cartmell, for the Board of Trade. Sub-ss. 3 and 4 are a statutory code for dealing with claims against the assets of a company's English business. That code prevails till the winding up of the business is completed. German creditors are to be satisfied out of German assets, English creditors out of what is in the United Kingdom. The Board of Trade does not object to "persons interested in the business" including shareholders.

YOUNGER J. (after stating the facts). The relevant provision of the Act is the last sentence of s. 1, sub-s. 3: "Any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Board of Trade may direct." Much of the reasoning to be found in the judgment just delivered (1) and in the cases there cited applies to the solution of the question which here emerges. The company is not in liquidation: the rights of the shareholders in the company as a going concern have not been lost; their rights as contributories of the company as in liquidation have not yet arisen. The claims of creditors of the company as distinct from creditors of the business have been neither inquired for, ascertained, nor satisfied. With such claims, if any there be, the controller has nothing to do. It is not suggested that the Board of Trade, under the words I have read, has power to distribute the assets in question amongst persons other than those entitled to claim them, or otherwise than in accordance with the rights and interests of such persons. To hold, therefore, that the Board may distribute this surplus amongst the shareholders direct would be equivalent to holding that this Act authorizes a return of capital to the shareholders of a limited company without a winding up and without paying the company's general debts or otherwise complying with the provisions of the Companies (Consolidation) Act, 1908, applicable to a reduction of capital where the rights of creditors are affected.

In my opinion the Board has no such power. It is beyond the province of the controller to settle a list of contributories or to adjust their rights amongst themselves. There are not yet any contributories of this company in the sense in which that word is used in s. 186 (v.) of the Companies (Consolidation) Act, 1908. In my opinion nothing in the general words of s. 1, sub-s. 2, of this Act of 1916 suffices to enable the Board to confer powers upon a con- oller which involve or presuppose the existence of an actual dation of the company, which, as is shown by s. 1, sub-s. 7,

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(1) *In re Th. Goldschmidt, Ld.*, ante, p. 194.

YOUNGER J.
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may or may not follow an order under the Act. Sect. 4, sub-s. 3, of the Act may conveniently be referred to in this connection. That sub-section is as follows: "Where in exercise of the powers conferred on him by the Board of Trade or by the Court under this Act or by virtue of the Trading with the Enemy Amendment Act, 1914, the custodian proposes to sell any shares or stock forming part of the capital of any company or any securities issued by the company in respect of which a vesting order under either of the said enactments has been made, the company may, with the consent of the Board of Trade, purchase the shares, stock, or securities,"—now come the important words—"any law or any regulation of the company to the contrary notwithstanding, and any shares, stock, or securities so purchased may from time to time be re-issued by the company." That section shows that, where the general law applicable to the rights and powers of companies as against their members is intended to be abrogated by this Act, care is taken expressly to say so. There is nothing in the provisions for distribution contained in s. 1, sub-s. 3, to the like effect. The words are perfectly general. They are applicable to an individual or to a firm owning the business from which the assets are derived, as much as they are applicable to a company. And just as these assets would in the former cases be refunded to their individual owners, so there is no reason why they should not in like manner be returned to or held for a company owner, a company which, as I have pointed out in *In re Kastner & Co.* (1) may not have an enemy amongst its members. This conclusion has the further advantage that beyond what is strictly necessary for the immediate purposes of the statute it involves no interference by an emergency Act like the present with a settled, carefully considered, elaborate, and still existing scheme of legislation regulating limited companies in the United Kingdom.

Solicitors: *Reynolds & Miles; Solicitor to the Board of Trade.*

(1) [1917] 1 Ch. 390.

A. L.

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In re GILLIES' SETTLEMENT.

ARCHER *v.* PENNEY.

[1916 G. 1804.]

EVE J.
1917
June 7.

Settlement—Real Estate—No Words of Limitation—Equitable Estates in Fee Simple.

By a voluntary settlement made in 1869 the settlor (after reciting that he was seised of or entitled to the hereditaments thereinafter described for an estate of inheritance in fee simple in possession, and that, in consideration of the natural love and affection which he bore towards his wife and children, was desirous of conveying the same to the uses upon the trusts and with and subject to the powers and provisions thereinafter declared) granted unto the trustees therein named, their heirs and assigns, certain freehold hereditaments and all the estate, right, title, property, claim, and demand of the settlor in, to or out of the same hereditaments, to hold the same unto the trustees and their heirs, to the uses and upon the trusts thereinafter declared (that is to say) upon certain trusts in favour of the settlor and his wife during their joint lives and the life of the survivor, and subject thereto upon trust for such one or more of their children as they should by deed jointly appoint, and in default of such appointment as the survivor of them should by deed or will appoint, and in default of such appointment, then in trust for all their children who being sons should attain twenty-one or being daughters should attain that age or marry in equal shares, the shares of daughters to be for their separate use. The settlor empowered the trustees to apply "the annual income of the share or fortune" to which any child should for the time being be entitled in expectancy for his or her maintenance, and further empowered them to sell the hereditaments and invest the moneys to arise from such sale and stand possessed of the investments and the income thereof upon the trusts thereinbefore declared of the hereditaments:—

Held, that under the trust in default of appointment the children were entitled to equitable estates in fee simple notwithstanding the absence of express words of limitation.

Adjourned Summons.

By an indenture dated December 9, 1869, made between William Gillies of the one part and Robert Mather Davidson and George Beldon of the other part (after reciting that "William Gillies was seised of or entitled to the hereditaments thereinafter described for an estate of inheritance in fee simple in possession, and that

EVE J.
1917
Gillies' Settlement, *In re.*
Archer v. Penney.

in consideration of the natural love and affection which he bore to his wife and children respectively and for divers other good causes and considerations he was desirous of conveying the said hereditaments to the uses, upon the trusts, and with and subject to the powers and provisions thereinafter declared and contained), the said William Gillies granted and confirmed unto the said Robert Mather Davidson and George Beldon and their heirs the freehold hereditaments therein mentioned, and all the estate, right, title, property, claim, and demand of the said William Gillies in, to, or out of the same hereditaments, to have and to hold the same hereditaments unto the said Robert Mather Davidson and George Beldon and their heirs, to the uses and upon and for such trusts, intents, and purposes as were thereinafter declared and contained concerning the same—that is to say, upon certain trusts in favour of the said William Gillies and his wife during their joint lives and the life of the survivor, and subject thereto " upon trust for the child or such one or more of the children of the said William Gillies by his said wife in such manner and form in every respect as the said William Gillies and Jane his wife shall have by any deed or deeds jointly appointed, and in default of such appointment and so far as no such appointment shall extend as the survivor of them the said William Gillies and Jane his wife shall by any deed or deeds or by will or codicil appoint, and in default of any such appointment and so far as no such appointment shall extend then in trust for all the children or any the child of the said William Gillies by his said wife who being sons or a son shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or previously marry and if more than one in equal shares the share or shares of the daughter or daughters being for their separate use " ; and it was thereby declared that the said trustees or trustee should after the decease of the survivor of them the said William Gillies and Jane his wife " apply the whole or such part as the said trustees or trustee shall think fit of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinafter declared for or towards the maintenance or education of any such child " ; and it was thereby further declared that the said trustees or trustee should either retain the said hereditaments in the present state of investment or should at any time with the consent in writing of the said William Gillies and Jane his wife during their joint lives and of the survivor of them during his or her life, and after the decease of the survivor in the discretion of the trustees or trustee, sell the same or any part thereof and invest the moneys to arise by such sale in manner therein mentioned, and should stand possessed of the said investments and the income thereof upon the trusts thereinbefore declared of and concerning the said hereditaments.

Robert Mather Davidson died in 1884 and George Beldon died in 1887. William Gillies died in 1895, having appointed the defendants the executors and trustees of his will; and Jane Gillies died in 1916. William Gillies and Jane Gillies made no joint appointment of the hereditaments comprised in the settlement; and Jane Gillies, as the survivor of them, made no appointment by deed or will. They had eight children, all of whom attained the age of twenty-one years.

The originating summons as originally framed asked for the appointment of new trustees of the settlement. It was amended by making the eight children plaintiffs and the executors and trustees of the will of William Gillies defendants and raising two questions of construction—(1.) whether the trustees of the settlement took the legal estate in the hereditaments thereby assured, or whether the legal estate became vested in the persons beneficially interested; and (2.) whether the children took estates in fee simple or estates for life only.

EVE J. directed an order for the appointment of new trustees to be drawn up with all necessary vesting orders, and in answer to the first question of construction held that the trustees of the settlement took the legal estate.

On the second question of construction,

T. T. Methold, for the plaintiffs. The children take equitable estates in fee simple. It is well settled that an equitable estate in fee simple may pass without words of limitation if there is sufficient indication in the deed of an intention that it should pass: *In re Nutt's Settlement* (1); *In re Oliver's Settlement* (2); *In re Tringham's*

(1) [1915] 2 Ch. 431.

(2) [1905] 1 Ch. 191.

Trusts. (1) There are several indications in the present deed of such an intention. In the first place the recitals themselves point to an intention to dispose of the entire inheritance for the benefit of the children. In the next place the language of the maintenance clause refers to the income of a child's share or fortune, which is not appropriate language if the child was only entitled to a life estate. In the next place the power of sale conferred on the trustees, which extends to the whole fee simple, coupled with the direction that the investments and the income thereof are to be held upon the same trusts as the hereditaments, points to an intention to dispose of the entire fee simple in favour of the children. Moreover, the settlor has conferred powers of appointment on himself and his wife and the survivor of them which would have authorized an appointment of the equitable fee simple in favour of the children, and it would be inconsistent with that intention to construe the limitation in default of appointment as conferring on them life estates only. This circumstance distinguishes the present case from *In re Whiston's Settlement.* (2)

G. M. Hildyard, for the defendants. In the absence of words of limitation the children take life estates only, and there is a resulting trust of the reversion in fee simple in favour of the settlor. There are no sufficient indications in this deed of an intention to pass the equitable fee simple. There may be a little ambiguity in the language of the maintenance clause, but similar recitals and a power of advancement very similar to the maintenance clause in the present case occurred in *In re Whiston's Settlement* (2) and were there held insufficient by Chitty J.; nor is there any inconsistency in the settlor conferring a power of appointment which would enable the appointor to appoint the fee simple amongst the objects of the power and then giving to the same objects a less estate in default of appointment. [He also referred to *In re Thursby's Settlement.* (3)]

EVE J. The question now raised is a nice one relating to the interest which the children of the settlor take in remainder under a voluntary settlement of real estate made by William Gillies. The settlement, which bears date December 9, 1869, is in the following terms: [His Lordship read the recitals and witnessing part, and continued:] Pausing there, it is clear that, in the absence of words of limitation, prima facie the estates to which the children would be entitled under this trust would be equitable estates for their lives only. The question is whether there are to be found in this deed sufficient indications of the settlor's intention that they should take equitable estates in fee simple. Mr. Methold, on behalf of the children, says that there are such sufficient indications, and he relies first upon the recitals. It appears to me, however, that this point is effectually disposed of by the observations of Chitty J. in *In re Whiston's Settlement* (1), where there was a similar or even stronger recital to the effect that the settlor "was desirous of settling all his freehold and personal estate for the benefit of himself his wife and his family," and the learned judge said that in his opinion "that recital is not sufficient to carry the fee; besides the settlor after having so far benefited them by giving them a life interest, might have intended the reversion in fee to result to himself." The recitals in the present case, therefore, are not in my opinion sufficient by themselves to support Mr. Methold's contention.

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(1) [1904] 2 Ch. 487.

(2) [1894] 1 Ch. 661.

(3) [1910] 2 Ch. 181, 188.

Reliance was next placed on the maintenance clause empowering the trustees to apply the whole or such part as they may think fit "of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy" for or towards his maintenance and education. Mr. Hildyard, who contended that the children take estates for their lives only, admitted that this clause does raise some ambiguity, for if a child's interest is a life interest only it would hardly have been appropriately referred to in the above language, and in the absence of authority I think I should have regarded it as tending to support Mr. Methold's argument; but in *In re Whiston's Settlement* (1), to which I have already referred, there was an advancement clause in some respects stronger than the maintenance clause in the present case, and Chitty J. said that he did not think that "it made any difference or helped the argument for the children."

The clause empowering the trustees to sell the hereditaments and invest the proceeds of sale and hold the investments and the income thereof upon the trusts therein declared of the heredita-

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(1) [1894] 1 Ch. 661, 664.

EVE J.
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GILLIES' SETTLEMENT, *In re.*
ARCHER *v.* PENNEY.

ments was also relied upon, but I do not myself attach much importance to that clause as showing any intention to enlarge the interest given to the children. It seems to me merely to authorize one mode of investment in place of another.

Finally Mr. Methold points out that there are interposed between the life interests of the settlor and his wife and the ultimate trust in favour of the children powers of appointment reserved first to the settlor and his wife jointly and secondly to the survivor of them solely to appoint in favour of their children—powers which would unquestionably have authorized an appointment of the fee simple; and that, he argues, is an element which was not present in *In re Whiston's Settlement* (1), the authority upon which Mr. Hildyard mainly relied, and is one which must be taken into consideration in the present case. I think there is great force in that contention, and I have come to the conclusion that I should be acting inconsistently with the intention of the settlor to be gathered from the whole of this deed if I were to construe it as conferring on the children a less interest in default of appointment than that which the donees of the respective powers had power to appoint to them. That is to say, that on the whole I think there are in this settlement sufficient indications of an intention to give equitable estates in fee simple to the children in default of appointment, and I answer the question raised by the summons accordingly.

Solicitors: *Rawle, Johnstone & Co., for Cooper & Goodger, Newcastle-upon-Tyne.*

(1) [1894] 1 Ch. 661, 664.

A. C.

THOMPSON BROTHERS & CO. *v.* AMIS.

SARGANT J.

1917

April 23, 24, 25.

[1917 T. 24.]

Revenue—Excess Profits Duty—Remuneration of Person concerned in Management of Business—Declaration as to Future Rights—Finance (No. 2) *Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *ss.* 38, 39, 40 ; *Sched. IV., Part I., clause* 5—*Finance Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 24), *s.* 49.

Prior to July 19, 1916 (when the Finance Act, 1916, received the Royal assent), the defendant had been employed by the plaintiffs in a business in which excess profits were made which were taxable under the Finance (No. 2) Act, 1915. The defendant, though not a partner, and acting as a market clerk, had a larger position than the other market clerks of the plaintiffs' firm, inasmuch as he was allowed to sign cheques, attend the meetings of and advise the partners, and personally conduct matters of importance. His remuneration was a sum equal to a share of the profits and of the same amount as the share of each of the junior partners. Part of his share was earned at periods to which both the Acts applied, and the surveyor of taxes refused to allow the plaintiffs to deduct from the excess profits on which duty had to be paid the increase in the defendant's remuneration. An appeal had been lodged against this decision, and the plaintiffs had not paid the duty, but were willing that the appeal should be prosecuted in their name by the defendant on his indemnifying them :—

Held—(1.) that it was in the discretion of the Court to decide, and proper for it to decide, the question whether, on paying the duty, the plaintiffs were entitled to recover from the defendant, under s. 49, sub-s. 2, of the Act of 1916, the amount paid by them as excess profits duty in respect of the increase in the defendant's remuneration ; (2.) that sub-s. 2 of s. 49 was not limited to the cases governed by sub-s. 1 ; (3.) that the lastly mentioned amount could be recovered from a person who was a "manager" or "a person concerned in the management of the trade or business" who was "remunerated out of the funds of the trade or business," within the meaning of sub-s. 3 of s. 49 ; and (4.) that the defendant was so concerned and remunerated.

An agreement dated March 27, 1912, and made between the plaintiffs, Henry Amis, George Malcolm Thompson, and Douglas Farquhar Glennie, carrying on business in partnership under the style of "Thompson Brothers & Co." at an address in the city of London (thereinafter called "the firm"), of the one part and the defendant, James Amis, of the same place, of the other part, contained the following clauses :—

"1. The firm agree to employ the said James Amis and said

James Amis agrees to serve the firm at" the address given " and elsewhere as required for a period of three years from January 1, 1912, and thereafter until this agreement shall be terminated by either party giving or sending by post to the last known address in the United Kingdom of the other six calendar months' notice in writing of desire to terminate this agreement on any December 31 or June 30, commencing with December 31, 1914."

" 2. The remuneration of the said James Amis shall be whichever shall be the greater of the following sums, namely (*a*) the sum of 600*l*. per annum, or (*b*) a sum equivalent to seven thirty-seconds of the net divisible profits of the firm as shown by their profit and loss account, after making such provisions as the members of the firm think fit for losses, outgoings and reserve, such profit and loss account to be accepted without question or investigation by the said James Amis. The said James Amis to have free access to examine the half-yearly profit and loss account of the firm. The said James Amis may draw on account of his remuneration any sum not exceeding 50*l*. in every month."

" 5. The said James Amis shall, whenever required, deliver to the firm full and correct accounts of all his receipts and payments, transactions and dealings in relation to the business, and shall not in any way pledge the credit of the firm or expose them to any pecuniary liability except so far as he may be authorised by the firm from time to time whether generally or in any particular case."

" 6. Nothing herein contained shall constitute a partnership between the parties for any purpose whatsoever, or expose the said James Amis to any of the liabilities, or confer on him any of the rights, of a partner, and the said James Amis shall not hold himself out as a partner in the business or do any act or thing whereby a partnership may be deemed to exist between him and the firm."

Thompson Brothers & Co. were merchants and millers in the city of London having an extensive business in the purchase and sale of cereals and pulses and other things of a like nature.

By the agreement the actual nature of Amis's employment was not defined, and his duties were not marked out. He was employed under the agreement until December 31, 1915, when the employment was terminated by notice.

The original division of profits amongst the three partners was that the profits were divided into twenty-five shares, of which the senior partner took eleven and each of the junior partners seven. Then came the allocation to the defendant of seven thirty-seconds. The thirty-two shares were arrived at by adding seven to the twenty-five, and when seven of the thirty-two were taken away for the defendant the remuneration of each of the two junior partners, formerly seven twenty-fifths, became seven twenty-fifths of the remaining twenty-five thirty-seconds, and therefore seven thirty-seconds of the whole. So far as remuneration was concerned the result was that, apart from one or two allowances, not considered as salary, the profits were divided into thirty-two shares, of which the senior partner took eleven, each of the junior partners seven, and the defendant the remaining seven. The defendant was on precisely the same footing as regarded remuneration as the two junior partners. The defendant, who had been in the business before, had gone out and been a principal in another business of the same kind, and had come back, and on his return, although acting as a market clerk, he was given a very much larger position than that of an ordinary market clerk. Amongst other things he was entitled to sign cheques on behalf of the firm, and the other two market clerks employed by the firm were not allowed to do that. Furthermore, he was allowed to take as active a part in the general determination of the policy and procedure of the business of the firm as any of the partners. The defendant suggested, when he returned, that there should be frequent meetings, practically every week, of the three partners and himself. No one else was present at those meetings, except so far as a clerk or the cashier, or some one of the same sort, might be called in to give some information to the four persons forming the meeting. At these meetings the policy of the firm and all the other matters connected with the firm were freely discussed by the partners and the defendant—very freely on his behalf, and so freely and with such somewhat excited language that occasionally the partners or one of them had to call the defendant's attention to the fact that he was not a partner. Then, on one occasion at any rate, he went to Liverpool to carry through there, so far as it could be carried through there, a very large transaction with regard to the purchase of the whole or part of the cargo of a ship. The purchase was actually made in London, but in that and many other matters the defendant, if not a partner, was next door to one.

The practice of the firm varied after the date of the agreement at the times material for the purposes of the action. They had their accounts made up twice a year, on March 31 and September 30. There were therefore four accounting periods which might affect the defendant for the purposes of the excess profits legislation. The first period ended on September 30, 1914, the second on March 31, 1915, the third on September 30, 1915, and the fourth on March 31, 1916. Therefore the defendant was interested in respect of one half of the last period.

During each of the four periods excess profits were made. The accounts for the first two periods were sent to the proper authorities early in 1916, and an assessment was made on or about April 6, 1916. Under that assessment the whole of the payment made to the defendant, Amis, both so far as it was equal to his pre-war remuneration and so far as it exceeded that amount, was allowed by the authorities to be deducted by the firm in ascertaining what were their excess profits, and no question arose between the plaintiffs and the defendant as to the increased remuneration during those two periods.

Soon after the end of the period ending on September 30, 1915, the accounts of the firm were taken, and there was found to be due to the defendant, in respect of that half-yearly period, a sum of 7560*l.* 9*s.* 8*d.*

On July 19, 1916, the Finance Act, 1916, received the Royal assent.

After the remuneration down to September 30, 1915, had been ascertained a question of this nature arose between the defendant and the plaintiffs. He claimed to be entitled to be paid that amount at once. The plaintiffs objected that there might be some question as to his being chargeable with regard to his excess remuneration; and that at any rate his remuneration could not be definitely ascertained until the end of the year, because, although the firm took accounts half-yearly, still it was on the basis of the two half-yearly accounts making up the total year that the defendant's remuneration had to be ascertained, and there might be losses which had to be set off. In that state of things the defendant issued two writs against the plaintiffs the first on December 24, 1915, and the second on February 15, 1916—claiming the 7560*l.* 9*s.* 8*d.*, and by the second writ making a claim in respect of the broken period and claiming an account. Soon after that, on April 7, 1916, when the plaintiffs knew that they were being allowed the full amount of the defendant's remuneration for the first two periods, and when they saw that there was no prospect of there being any loss, they paid to the defendant a sum which—after some small adjustment in respect of interest and of drawings that he had already made—was smaller than the 7560*l.* 9*s.* 8*d.*, but was based upon the defendant being entitled to that sum for remuneration. That having been done, it was referred to an arbitrator to ascertain (1.) who had to pay the costs of the actions, and (2.) what ought to be paid to the defendant by way of remuneration in respect of the quarterly period down to December 31, 1915; and ultimately the arbitrator made an award under which the plaintiffs were to pay to the defendant a lump sum of 2000*l.* in respect of both items lumped together, there being no apportionment in respect of the two items.

The excess profits accounts in respect of the third period and the broken third period were sent to the authorities some time in October, 1916, and on December 6, 1916, the surveyor of taxes made his assessments, and then declined to allow the plaintiffs the claim which they made for the deduction from their profits for the year ending on September 30, 1915, and for the half-year ending on March 31, 1916, of the increased amounts which had been paid for remuneration to the defendant in respect of the whole of the two periods ending on March 31 and September 30, 1915, and in respect of half of the period ending March 31, 1916. Then on December 13, 1916, the accountants who acted for the plaintiffs sent in to the surveyor objections to those allowances, and by letter of December 15, 1916, the surveyor stated that he was willing to accept the accountants' letter as a notice of appeal against the disallowances; but on the request of the plaintiffs' solicitors he allowed the matter of the appeal to stand over, and he was not going to exact payment from the plaintiffs pending the present action being brought by the plaintiffs against the defendant and the questions as between them being determined by the Court.

The plaintiffs in this action claimed a declaration "that the plaintiffs are entitled to recover from the defendant, as and when the same shall have been paid by them, any sums or amounts payable by the plaintiffs by way of excess profits duty in respect of the increased remuneration of the defendant for the period from April 1, 1915, to December 31, 1915, in excess of his remuneration for the corresponding period of the last pre-war trade year of the plaintiffs' business, or in respect of so much of such increased remuneration for the period aforesaid as shall not be allowed as a deduction in assessing the amount in respect of which the plaintiffs are liable to be assessed for excess profits duty," and that, if necessary, directions might be given as to the manner in which the sums which the plaintiffs should be so entitled to recover from the defendant ought to be ascertained.

George Wallace, K.C., and *R. M. Pattisson*, for the plaintiffs. The effect of s. 49 of the Finance Act, 1916, is to entitle the plaintiffs to recover from the defendant what they may have to pay through the authorities refusing to allow a reduction in respect of the defendant's increased remuneration for the third of the four periods and the broken fourth period. Although the question of amount has not yet been finally settled, it is proper to ask for a declaration now as to the rights of the parties. The defendant is either a " manager " or a " person concerned in the management " of the business within the meaning of sub-s. 3 of s. 49.

P. O. Lawrence, K.C., and *J. F. Carr*, for the defendant. It is not now contended that the arbitration decided the whole matter. The other three defences are on the Act of 1916. They are (1.) that as the amount is not recoverable from the defendant until it has been actually paid to the authorities, this action is not maintainable; (2.) that s. 49, sub-s. 2, does not apply but is limited in its application to the cases dealt with by sub-s. 1; and (3.) that the defendant, although remunerated by a share of the profits, is not a " manager " or " person concerned in the management of the trade or business " within s. 49, sub-s. 3. [They referred to *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1), *In re Staples* (2), *William Hollins & Co.* v. *Paget* (3), and *Pike* v. *Stephens.* (4)]

(1) [1915] 2 K. B. 536.
(2) [1916] 1 Ch. 322.
(3) [1917] 1 Ch. 187.
(4) (1848) 12 Q. B. 465.

George Wallace, K.C., in reply, said that the plaintiffs were willing to undertake to allow the defendant to prosecute any appeal from the surveyor's decision in the name of the plaintiffs, on the defendant indemnifying them in the usual way.

Cur. adv. vult.

April 25. SARGANT J., after referring to the claim of the plaintiffs and to the terms of the agreement and other facts down to the 7560*l*. 9*s*. 8*d*. being shown to be due to the plaintiffs, continued as follows: The main question arises with regard to the excess of that sum of 7560*l*. 9*s*. 8*d*. over the pre-war half-yearly remuneration of the defendant. There is also a question as to the excess remuneration of the defendant over the fourth period, but that will have to be determined on precisely the same footing. [His Lordship then stated the facts leading up to and as to the defendant's two previous actions and the arbitration, and continued :] On July 19, 1916, the Finance Act, 1916—which amended the Finance (No. 2) Act, 1915—was passed, and it is with reference to the provisions of the Act of 1916 that the present action is brought. It is said that by virtue of that statute a right is given to the plaintiffs to recover from the defendant what they may have to pay in respect of any refusal on the part of the authorities to allow a deduction in respect of the defendant's increased remuneration for the third period and the broken fourth period. [His Lordship then stated the facts as to the sending in of the last two excess profits account, and what the surveyor had done, and continued :] Accordingly this action has been brought and has now been heard.

Four defences were raised by the defendant to the plaintiffs' claim. The first one, entirely outside the Acts, was that the arbitration decided the whole matter; but this defence was very properly abandoned by Mr. Lawrence in the course of the case.

Then came three other defences, all of which were based upon the language of the two statutes, but before I go in detail into those defences I had better deal with the material parts of the statutes.

The Finance (No. 2) Act, 1915, which received the Royal assent on December 23, 1915, provided, by s. 38, that excess profits duty should be levied in respect of, speaking generally, excess profits earned by concerns beyond what they had earned on an average of the three years immediately preceding the war. A standard rate of profit was instituted, and in respect of the excess of profit 50 per cent. had to be paid to the Government. I need only say, as to s. 38, that sub-s. 1 imposes the taxation and that sub-s. 2 provides how the periods for accounting are to be ascertained. By s. 39 a definition is given of the trades and businesses to which the Act applies. Under sub-head (*c*) there is excepted from those trades and businesses "any profession the profits of which are dependent mainly on the professional qualifications of the persons by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount." But then are introduced, against those exceptions, the following words: "but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)." Then s. 40 makes certain provision for cases in which a standard rate of profit cannot be ascertained—principally in cases where the business in question has been started too short a time before the war to afford a standard rate of profit; and in such cases a certain percentage standard is instituted, by way of percentage on capital employed, for arriving at a notional rate of profit. And I think it is perhaps material to state that in the case of companies and corporations the rate of interest which was to be assumed to be the rate of profit was 6 per cent., whereas in the case of firms and unincorporated firms the rate was 7 per cent., so that some slight advantage was given to unincorporated firms. I suppose it was thought that the percentages were the ordinary rates of profit, and that the rate for unincorporated firms was rather higher, in respect of the capital employed, than the rate of profit of corporations. However that may be, there was an advantage given to unincorporated firms.

Then, in Part I. of Sched. IV. to the Act, which provided the way in which the profits were to be computed, there is a very important clause for the purposes of this case, namely, clause 5, which is in the following terms: "Any deduction allowed for the remuneration of directors, managers, and persons concerned in the management of the trade or business shall not" (now comes the beginning of a parenthesis so far as this case is concerned) "unless the Commissioners of Inland Revenue, owing to any special circumstances or to the fact that the remuneration of any managers or managing directors depends on the profits of the trade or business, otherwise direct" (that ends the parenthesis), "exceed the sums allowed for those purposes in the last pre-war trade year or a proportionate part thereof as the case requires." I need not read the rest. That obviously was to prevent the remuneration being increased and thereby there being a diminution of the amount of profit shown for the purpose of calculating the duty on the excess profits. But there is that peculiar exception under which the Commissioners of Inland Revenue may allow increased remuneration where they see that the greatly increased prosperity of the business has in itself increased the remuneration payable to the managers, so that the owners of the business have necessarily had to have their profits reduced concurrently with the amount of increase of excess profits. That seems to be the reason of clause 5.

Then came the Finance Act, 1916, and for the present purpose I think the only material section is s. 49. Sub-s. 1 is as follows: "Where the pre-war standard of profits is taken to be the percentage standard or is calculated by reference to the statutory percentage in the case of any trade or business owned or carried on by a company or other body corporate whose directors have a controlling interest, the Commissioners of Inland Revenue may, if they think fit, as respects any accounting period, including a past accounting period, for the purpose of the provisions relating to the statutory percentage and for the purpose of the determination and computation of profits under Part I. of the Fourth Schedule to the principal Act, treat the company or body corporate as if it were a firm and not a company or body corporate and the directors or any of them as if they were partners in the firm." That sub-section may have some other effect, but it is mainly directed to this: Where an incorporated body is substantially equivalent to a private firm it allows the percentage standard of profit to be raised by being calculated at the rate of 7 per cent. instead of 6 per cent., and so reduces in those cases the amount of the excess profits on which the company, which is practically like a firm, is to be charged.

Then comes sub-s. 2, which is much the most important subsection for the purposes of the present case. Sub-s. 2 is as follows: "If as respects any accounting period ending on or after the first day of July nineteen hundred and fifteen, the Commissioners of Inland Revenue refuse to allow a deduction in respect of any increase in the remuneration of directors of any trade or business, and the taxpayer is required to pay excess profits duty in respect of the disallowed deduction, the taxpayer shall be entitled to recover from any such director the amount which the taxpayer has paid by way of excess profits duty in respect of the increase; but any amount so recovered shall, unless the Commissioners otherwise direct, be treated as excess profits duty paid by the director from whom it is recovered and not as excess profits duty paid by the taxpayer." And then sub-s. 3 says: "In this section, the expression 'directors' includes any managers or persons concerned in the management of the trade or business who are remunerated out of the funds of the trade or business."

It is on that legislation that there arises the right of the plaintiffs, if any, to sue the defendant; because that is the legislation by which is given a right of action under certain circumstances to recover.

The defences raised to the present action in view of that legislation are three.

The first defence is that the amount is not recoverable under s. 49 unless and until the plaintiffs have actually paid the amount to the authorities—which they have not done—and, therefore, the action is not properly maintainable. Now it has been decided in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1) that it is not necessary to the bringing of an action for a declaration that there should be a complete cause of action existing. In view of that case Mr. Lawrence very properly admitted that there was jurisdiction in this Court to make such a declaration as is claimed although there is not a presently available cause of action to recover the money on the ground that the plaintiffs have not yet paid it. But Mr. Lawrence says that the jurisdiction is one which the Court should be careful in exercising, and that on the whole the Court, in the exercise of a judicial discretion, should decline to make a declaration of the kind. It is also said that the defendant may be prejudiced if the declaration is made against him by practically having to fight the appeal of the plaintiffs on his own behalf against the decision of the surveyor. It is very difficult to lay down the cases in which the Court ought to exercise the discretion, and I shall not attempt to do it, but I do see that here there is as near a complete cause of action as in any case I can conceive. The plaintiffs have had found against them by the authorities that it is not right to make these disallowances, and the consequence is that after that finding all they have to do is to make a payment to the authorities, and then undoubtedly they will have a complete present cause of action to seek to recover the money. Naturally they do not wish to make the payment unless it is absolutely clear that they are going to recover, or at any rate until the point has been decided, because it is sometimes very much more difficult to recover moneys that have been paid to any one—not the least of all to the Revenue—than to delay the making of the payment. Having in view the undertaking or the assurance that has been made by the surveyor of taxes, it seems to me that it is exceedingly convenient that the Court should determine what are the rights of the parties for the purpose, amongst other things, of knowing who is the person who is interested in prosecuting this appeal. I have asked the plaintiffs with regard to it, and they have expressly stated that they are perfectly willing, if a declaration is made against the defendant, to allow the defendant in their own name (on the usual terms of course) to carry on the proposed or suggested appeal against the decision of the surveyor. And having regard to that circumstance I think it is eminently desirable that the rights of the parties should be determined here and now by granting or refusing such a declaration as is asked.

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(1) [1915] 2 K. B. 536.

The second ground of defence on the statutes (the third defence of the four) is that s. 49, sub-s. 2, does not apply to the present case, but that it is limited in its application merely to the cases which are dealt with in sub-s. 1, that is to say, to those cases in which a percentage standard rate has to be arrived at. As regards that, it seems to me that both the language and substance of the matter are against the defendant. Under the present method of legislation the sub-sections of a section are very often perfectly independent

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items of legislation and appear together in a particular section merely because they relate to more or less the same sort of subject-matter. Here it is quite obvious that sub-s. 1 only relates to a limited class of cases, and, that being so, when one comes to look at sub-s. 2 one sees the language is this: "If as respects any accounting period . . . . the Commissioners . . . . refuse to allow a deduction in respect of any increase in the remuneration of directors of any trade or business." The words "any trade or business" are universal, and I can conceive it would be a somewhat violent change of language to read those words as meaning "any trade or business dealt with by the foregoing sub-section" or "to which the foregoing sub-section is applicable," or to add the little word "such," and read it as "any such trade or business." I think that is emphasized by this fact, that, having regard to the extremely limited scope of sub-s. 1 of s. 49, if you were to superimpose on that very limited class of cases the comparatively limited class of cases dealt with by sub-s. 2, you would practically render sub-s. 2 so limited in its application as almost to be negligible. But, further, it seems to me that, for a proper interpretation of sub-s. 2, you are, by its very language, thrown back to clause 5 of Part I. of the Fourth Schedule of the Finance (No. 2) Act, 1915, and I see no reason why the scope of sub-s. 2 should not be as great as the scope of clause 5. Further than that, when clause 5 comes to be examined from the point of view of substance and of the practical working of the Act, I am sure this point is one that must have emerged. It is quite clear to my mind that there was a serious blot in the scheme set out in clause 5 which is this. The Commissioners were to be at liberty to allow a deduction (I suppose they would generally act on that power) in respect of the increased remuneration of persons if and when that remuneration depended upon the profits of the trade or business. Now it is quite clear that if you get managers who are practically or substantially in the position of partners, or having the control of the business, there is entirely the same reason for making those persons contribute to the Revenue out of their increased war profits as for making the partners in the firm contribute. It looks to me as if the anomaly obviously contained in clause 5, when once you come to consider its practical working, had been brought home to the Legislature, and as if sub-s. 2 of s. 49 was framed for the purpose of dealing with and avoiding that anomaly—and not the less because by sub-s. 3 the persons who are to be rendered liable are not merely persons who are getting an increased profit by way of percentage on the profits of the trade or business, but are also persons who are either managers or who are concerned in the management of the business. I think as a matter of substance the language of sub-s. 2 down to the last four lines, which I will deal with particularly, points very clearly to the intention to include persons who, though not principals, are really in the position of principals in two respects, namely, first, by receiving a remuneration dependent upon the profits, and, secondly, by having an active part in the conduct of the business or firm, and to put them in the same position with regard to taxation in respect of excess profits as the principals themselves.

But then comes a sentence which puzzled me for a long time, and on which very great stress was laid by Mr. Lawrence. The words are: "But any amount so recovered shall, unless the Commissioners otherwise direct, be treated as excess profits duty paid by the director from whom it is recovered and not as excess profits duty paid by the taxpayer." Though I do not think that the explanation given by Mr. Lawrence of the meaning of those words, if the whole of sub-s. 2 were to be limited to the cases mentioned in sub-s. 1, was entirely satisfactory, still I must confess that for a long time I was not able to put any satisfactory meaning on them if sub-s. 2 was to be construed in the larger sense which I have stated I prefer. But now I think that an explanation of those words is to be found, although it may not be the only explanation, by looking at s. 35 of the Finance (No. 2) Act, 1915. That section says that "where any person has paid excess profits duty under this Act the amount so paid shall be allowed as a deduction for the purpose of income tax in computing the profits and gains of the year." To take the present case, supposing the plaintiffs recovered, under s. 49, sub-s. 2, the amount which they are claiming against the defendant, the result would be that the defendant would not be paying to the plaintiffs under s. 35, sub-s. 1, of the Act of 1915, and the consequence might be that, although the defendant had been forced to make that payment to the plaintiffs, and was substantially paying excess profits duty in that way, yet he would not be allowed to deduct that in computing his ordinary income tax. And e converso it might probably be the case that the plaintiffs would be entitled to deduct the whole of what they had paid for excess profits duty when they were making a return for their income tax, although they had got back some of the excess profits by way of recovering from the defendant. Therefore I think that a perfectly intelligible meaning can be given to these words, and a more intelligible meaning than that suggested by Mr. Lawrence on his interpretation, which, to tell the truth, I did not quite understand. On the whole it seems to me that that sentence, so far from creating a difficulty in the way of the interpretation which I say I prefer, is in favour of that interpretation rather than against the more limited interpretation. That being so, I am of opinion that this defence also fails.

The last defence, which is clearly one of substance, is that the defendant, although he may be a person who is remunerated by way of share of profits, is not a "manager or person concerned in the management of the trade or business." That is a question of evidence, and I have heard the evidence on the point. The defendant was in a very peculiar position. [His Lordship stated the facts as to his remuneration and powers and duties, and continued :] On these facts I have to consider whether the defendant was a manager or a person concerned in the management of the trade or business. That phrase "person concerned in the management of the trade or business" is obviously intended by the Legislature to be a phrase of wider denotation than, and including more persons than are included in, the term "manager." Looking at the matter all round, it seems to me abundantly clear that, if not actually a manager, as to which I have some doubt, the defendant was at any rate a person concerned in the management of the business in question.

I have still to consider whether the defendant has also the qualification of being "remunerated out of the funds of the trade or business." Now it is quite clear that he had no right to receive any specific part of the profits. He could not under any circumstances, I think, have had a receiver of any part of the profits appointed. The language of the agreement is very carefully drawn so as not to make the defendant a partner or expose him to the liabilities of a partner; he is not given seven thirty-seconds of the profits, but is to be paid a sum equivalent to seven thirty-seconds of the net divisible profits; and it is quite clear that his only remedy in respect of that would be a personal remedy against the partners in the firm to recover a sum equivalent to that proportion of the profits. But in ninety-nine cases out of a hundred the manager of a business is not given any right specifically against the profits of the business, but has his remuneration secured by way of personal obligation on the part of the partners although his remuneration may depend upon the amount of the profits. In my judgment, I should be straining words and not giving them a broad business meaning, such as I think ought to be given to words in legislation of this kind, if I were to hold that the defendant did not come within the language of sub-s. 3 merely because he had no specific right against any part of the profits of the business.

In my opinion, all the defences to this action fail, and I propose to make a declaration as asked in the statement of claim, giving liberty to apply, if necessary, so as to ascertain what are the particular sums to which the plaintiffs are entitled by virtue of that declaration. As regards the sum for the period ending September 30, 1915, probably there is no question now. And as regards the sum for the broken period, I think that has been really determined by the result of the arbitration. I think the parties are bound to accept as the result of the arbitration that the 2000*l.*, less whatever amount ought to be taken out of that as representing costs, represents the profits due to the defendant for that half-year, and from that sum will have to be deducted his pre-war share of profits. In saying this I am of course only indicating generally the way in which the amount payable by the defendant will have to be arrived at under the liberty to apply. The defendant must pay the costs of the action.

Solicitors: *Gasquet, Metcalfe & Walton; A. Charles Knight & Co.*

F. E.

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May 16 17, 24.

In re ALSTON.

SINCLAIR *v.* WILLES.

[1917 A. 289.]

Lunatic—Property—Sale of Realty—Second Lunacy—Persons entitled to Proceeds of Sale—Lunacy Act, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 123.

A sum of stock standing in Court in lunacy to the credit of "Re W. A., a Person of Unsound Mind," represented the proceeds of sale of realty which had been devised in fee to J. A., the elder brother of W. A., who was also of unsound mind. Both of the brothers were bachelors and died intestate. The land was sold in 1898 in the lunacy of J. A., under the provisions of the Lunacy Act, 1890, and the purchase-money was paid into Court to the credit of "Re J. A., a Person of Unsound Mind. Proceeds of Real Estate," and was invested. After the death of J. A. in 1904, leaving W. A. his heir-at-law, the fund was transferred to the credit of W. A. in his lunacy:—

Held, following *In re Wharton* (1854) 5 D. M. & G. 33, that, but for the transfer of the fund to the credit of the second lunacy, the fund would have still retained the character of realty; that the transfer did not alter this character: and that on the death of W. A. the fund belonged to the heir-at-law of J. A.

Under the will, and a codicil thereto, of James Alston the elder, James Alston the younger became entitled to a freehold property for his life, with a power to appoint the property among his children for such estates and in such shares or proportions, manner, and form as he should by will appoint, and in default amongst the children equally.

James Alston the younger had four children only, namely, James Holte Alston, Margaret Crichton Alston, William Charles Orme Alston, and Edith Alston, all of whom were living at the date of his death in March, 1853.

Margaret C. Alston married one Sinclair and died in March, 1909, and their children were Sir John Rose G. Sinclair, Bart., Margaret Sinclair, and Norman Sinclair. Norman Sinclair died in 1904 leaving two infant children, namely, Ronald N. J. C. U. Sinclair and Robert A. Sinclair.

Edith Alston married one Willes, and their children were Charles E. Willes, Emily M. O. Willes, Arthur S. Willes, Isabel M. Willes (married to one Stanton), Richard Willes, Gladys Violet Willes (married to one Bircham and widowed), and Frederick W. Willes.

James Alston the younger by his will gave the freehold property to his son James Holte Alston absolutely, and the latter, who was never married, was found to be of unsound mind on May 8, 1863. In 1898 the freehold property was sold in his lunacy proceedings under the provisions of the Lunacy Act, 1890, and the proceeds of sale were paid into Court to the credit of "Re James Holte Alston, a Person of Unsound Mind. Proceeds of Real Estate," and invested in 15,817*l.* 12*s.* 11*d.* India 2½ per cent. stock, and the dividends were subsequently carried over and invested as directed. At various times portions of the stock were sold to pay duties and stock.

James Holte Alston died intestate on February 26, 1904, leaving William Charles Orme Alston, who had in the meantime (in 1864) been found to be of unsound mind, his heir-at-law, and the fund was by order in the lunacy proceedings of W. C. O. Alston carried over to the account of "William Charles Orme Alston, a Person of Unsound Mind." W. C. O. Alston, while still of unsound mind, died in February, 1917, a bachelor and intestate, and at his death the funds carried over were represented by 14,478*l.* 17*s.* India 2½ per cent. stock, part of a larger sum of that stock standing to the credit last aforesaid.

Sir John R. G. Sinclair took out an originating summons against the seven children of Mr. and Mrs. Willes, Margaret Sinclair, and the two infant children of Norman Sinclair for the determination of the questions—(1.) whether the 14,478*l.* 17*s.* stock was for the purpose of devolution on the death of W. C. O. Alston to be treated as his real or personal estate; (2.) whether, if the stock was to be treated as his real estate, the same devolved on and belonged to the plaintiff as the heir-at-law of W. C. O. Alston or belonged to him and the defendant Charles Edward Willes as his co-heirs; (3.) whether the personal estate of W. C. O. Alston was upon his death divisible per stirpes in equal moieties between the children living at his death of his deceased sister Margaret Crichton Sinclair and the children living at his death of his deceased sister Edith Willes, or was divisible in equal shares per capita among all the children, living at the death of W. C. O. Alston, of his said two deceased sisters.

Upjohn, K.C., and *Sheldon*, for the plaintiff. By s. 123, sub-s. 1, of the Lunacy Act, 1890, the lunatic and his heirs, executors, and others are to have the same interest in any moneys arising from any sale under the powers of the Act which have not been applied under such powers as he or they would have had in the property sold if no sale had been made, and the surplus moneys are to be of the same nature as the property sold. Here the purchase-money belonged to the first lunatic as real estate, and on his death descended to his brother, the second lunatic, as his heir-at-law. There is nothing in the sub-section to limit its operation to one lunacy. When J. H. Alston died the money never got into the hands of W. C. O. Alston as money, or in fact at all. It was carried over to his account in his lunacy, and he was never in such a condition as to be capable of electing to take the money as personalty. It therefore retained until his death the nature of real estate, and then descended as real estate. There is no alteration of the statutory character of the property until some one absolutely entitled and capable of electing elects to take the property as personalty and not as realty. Under the similar enactment of 11 Geo. 4 & 1 Will. 4, c. 65, s. 29, it was held that the purchase-money of real estate which had passed to the heir-at-law of a lunatic, who was also a lunatic, was still impressed with the character of realty at the death of the heir: *In re Wharton*. (1) The only difference between that case and this is that there there had been no carrying over of the purchase-money to the account of the second lunatic. That difference is immaterial. The carrying over was not an act even of the second lunatic, much less an election by him. Payment into Court in a lunacy without carrying it to a real estate account does not alter the rights of the parties: *In re Barker*. (2) It is a mere book-keeping entry. A lunatic cannot elect as to the character in which he will take property, and his lunacy, unless he recovers, is equivalent to his death: *Ashby* v. *Palmer*. (3) The Court cannot and will not make an election for the purpose of changing the character of an infant's

(1) 5 D. M. & G. 33.
(2) (1881) 17 Ch. D. 241, 245.
(3) (1816) 1 Mer. 296.

or lunatic's property so as to effect any alteration as to the succession to it: *Attorney-General* v. *Marquis of Ailesbury* (1); *Seeley* v. *Jago* (2); *In re Ryder.* (3) The fund in Court remained as real estate throughout the lives of the two lunatics, and on the death of the second went to the heirs of J. H. Alston, who took the estate as purchaser. [They also referred to *Wilder* v. *Pigott* (4); *Smith* v. *Claxton* (5); *Curteis* v. *Wormald* (6), *In re Richerson* (7), and *Mordaunt* v. *Benwell.* (8)]

Maugham, K.C., and *Whinney*, for the defendants C. E. Willes, E. M. O. Willes, A. S. Willes, I. M. Stanton, R. Willes, G. V. Bircham, and F. W. Willes. There is no question here of trust, or conversion, or election. Ordinarily there cannot be an election unless there is a trust. Here nobody could elect, and the case is outside that branch of the law. The statute is more limited in its effect than has been contended for. The purchase-money is not at all times land. The operation of s. 123, sub-s. 1, cannot continue indefinitely. The purchase-money is only land so long as it is in the pocket of the lunatic. *In re Wharton* (9) does not apply to this case. The carrying over of the fund to the separate account of the second lunatic was in effect payment to him. [They referred to *In re Grange.* (10)]

Upjohn, K.C., in reply.

Cur. adv. vult.

May 24. SARGANT J. The main question here is whether a sum of 14,478*l.* 17*s.* India $2\frac{1}{2}$ per cent. stock, part of a larger sum of like stock standing in lunacy to the credit of "Re William Charles Orme Alston, a Person of Unsound Mind," is, for the purpose of devolution on his death, to be treated as real estate or personal estate.

The fund in question represents the proceeds of sale of certain land which had been appointed or devised in fee to James Holte Alston, the elder brother of the intestate, who was also of unsound mind. This land was sold in the lunacy of J. H. Alston under the provisions of the Lunacy Act, 1890, and the proceeds were paid into Court to the credit of "Re James Holte Alston, a Person of Unsound Mind. Proceeds of Real Estate," and invested. And, after the death of J. H. Alston intestate in the year 1904, leaving the said W. C. O. Alston his heir-at-law, the fund, which was then and is now represented by the sum of 14,478*l.* 17*s.*, was transferred to the credit of W. C. O. Alston in his lunacy. There have been some additions to the fund, representing dividends thereon either prior or subsequent to the death of W. C. O. Alston, but there will be no difficulty as regards these when once the destination of the principal fund has been ascertained.

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(1) (1887) 12 App. Cas. 672, 689.
(2) (1717) 1 P. Wms. 389.
(3) (1882) 20 Ch. D. 514.
(4) (1882) 22 Ch. D. 263.
(5) (1820) 4 Madd. 484.
(6) (1878) 10 Ch. D. 172, 175.
(7) [1892] 1 Ch. 379.
(8) (1881) 19 Ch. D. 302.
(9) 5 D. M. & G. 33.
(10) [1907] 1 Ch. 313.

The question depends on the provisions of the Lunacy Act, 1890, and particularly on the terms of s. 123, sub-s. 1, thereof, which runs as follows: [His Lordship read the sub-section, and continued:] It is obvious that the language of this section is sufficient to include the present case. W. C. O. Alston was the heir of the lunatic in whose lunacy the real estate was sold; and but for that sale the land would have devolved on his death as land. And further, under the later words of the same sub-section, if "the surplus moneys"—a phrase which clearly includes here the whole price of the land—retained the nature of the property sold, the result would of course be that they would vest in W. C. O. Alston as real estate, and would descend accordingly on his death intestate. It is not unimportant to observe that the words of sub-s. 1 of s. 123 are expressed to operate generally, as contrasted with those of sub-s. 2, which operate only between the real and personal representatives of the lunatic himself. The difference is no doubt due to the moneys dealt with by sub-s. 2 being less completely identified with capital than those dealt with by sub-s. 1.

The present case appears to be covered by that of *In re Wharton* (1), where under almost precisely similar circumstances it was held that the heir-at-law of the second lunatic, who was himself the heir-at-law of the original lunatic, was entitled to the proceeds of sale of land of the original lunatic sold under legislation not materially different from the Lunacy Act, 1890. The only distinction between the two cases is that in *In re Wharton* (1) the proceeds of sale had not been transferred from the account of the original

(1) 5 D. M. & G. 33.

lunacy to that of the second lunacy. But I cannot think that a step of this kind makes any difference. So far as the original lunacy in each case was concerned, the lunacy, of course, came to an end at the death of the lunatic. And the order to transfer which was subsequently made in the present case was merely consequential on that death. So far as the second lunacy was concerned, the lunatic could not alter the nature of his interest in the property, nor would it be the practice of the Court to do so: *Ashby* v. *Palmer* (1); *In re Ryder* (2); *Attorney-General* v. *Marquis of Ailesbury.* (3) In my judgment the order for the transfer of the fund from the original lunacy to the second lunacy was a purely administrative act, having no effect on the rights of the lunatics or those claiming under them: *In re Barker* (4); *In re Freer.* (5)

Mr. Maugham pressed me hard with the argument that the provisions of s. 123, sub-s. 1, must have some limit of time placed on them, and cannot be supposed to continue indefinitely. That, no doubt, is so. When once the proceeds of sale become the property of an absolute owner not under disability, as will ordinarily be the case in a comparatively short time, there are many ways in which the special character impressed on these proceeds by the Act may, and almost certainly will, be got rid of. But I see no reason why this special character should not endure so long as the proceeds do not come home to such an owner. And I think that such a limit is a more reasonable one to impose on the general words of the statute than a limit which depends upon whether the proceeds continue to stand to the credit of the original lunacy, which seems to me primarily a question of administration and book-keeping rather than of substance.

Dealing then with the India stock, as being of the same nature as the land sold, the first lunatic took as a purchaser and the second lunatic by descent. Accordingly, on the death of the second lunatic the descent has to be traced from the first lunatic, and the persons entitled are two co-heirs claiming through his two deceased sisters—namely, (1.) the plaintiff Sir J. R. G. Sinclair, and (2.) the defendant C. E. Willes. They will therefore take equally between them the

(1) 1 Mer. 296, 301.
(2) 20 Ch. D. 514.
(3) 12 App. Cas. 672.
(4) 17 Ch. D. 245.
(5) (1882) 22 Ch. D. 622, 627.

SARGANT J.
1917
ALSTON, *In re.*
SINCLAIR *v.* WILLES.

principal sum of 14,478*l.* 17*s.* and any dividends since the death, including an apportioned amount of the dividend for the period current at the death. The dividends prior to the death and an apportioned amount of the dividend for the period current at the death will go to the next of kin of the second lunatic, W. C. O. Alston.

Solicitors for plaintiff: *Stileman & Neate.*

Solicitors for defendants: *Markby, Stewart & Co.; Walter J. Payne; Johnson, Raymond-Barker & Co.*

F. E.

YOUNGER J.
1917
May 11, 16.

In re BROWN.

LEEDS *v.* SPENCER.

[1917 B. 782.]

Will—Construction—Words of Futurity—Gift to Children of Testator—Substitutional Gift to Grandchildren—Child Dead at Date of Will leaving Children.

Testator, who died in 1874, by his will, made six days previously to his death, gave 500*l.* to each of the children of his deceased daughter, E., and disposed of his residue "Unto and equally amongst all my children, who being a son or sons have attained or shall hereafter attain the age of twenty-one years or being a daughter or daughters have attained or shall hereafter attain the age of twenty-one years or shall marry in equal shares; Provided always that if any child of me shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry then and in every such case the last mentioned child or children shall take (and if more than one, equally between them) the share which his, her or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of twenty-one years."

The testator had eight children by his first marriage, all of whom had attained twenty-one at the date of the will, and six children by his second marriage, none of whom had then attained twenty-one or married. E., a daughter by the first marriage, was to the knowledge of the testator dead at the date of the will leaving six children, all of whom were then living but none of whom had then attained twenty-one or married:—

Held, that the words in the proviso "shall die in my lifetime" were to be construed in their natural future sense, and that the children of E. were not entitled to any share in the residue.

Goring v. *Mahlstedt* [1907] A. C. 225 followed and applied.

In re Williams [1914] 1 Ch. 219 ; [1914] 2 Ch. 61 distinguished.

ADJOURNED SUMMONS.

The testator, Edward George Wade Brown, who died on May 19, 1874, by his will, dated May 13, 1874, gave his residuary real and personal estate to trustees upon trust for sale and conversion, and out of the proceeds to invest a sum of 5000*l.* upon trust in favour of his wife during her life or widowhood, and further gave the sum of 500*l.* to each of the children of "my late daughter Elizabeth Morey," and gave all the rest, residue, and remainder of his trust estate "unto and equally amongst all my children who being a son or sons have attained or shall hereafter attain the age of twenty-one years or being a daughter or daughters have attained or shall hereafter attain the age of twenty-one years or shall marry in equal shares ; Provided always that if any child of me shall die in my lifetime leaving a child or children who shall survive me and being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry then and in every such case the last mentioned child or children shall take (and if more than one equally between them) the share which his her or their parent would have taken of and in the residuary trust funds if such parent had survived me and attained the age of twenty-one years."

The testator was twice married. By his first marriage he had eight children, seven of whom were living at the date of the will and had then attained twenty-one. The eighth child, Elizabeth Morey, was then dead, having died on March 8, 1873, leaving six children, all of whom were living at the date of the will but none of whom had then attained twenty-one or married. By his second marriage the testator had six children, all of whom were living at the date of the will, but none of whom had then attained twenty-one or married.

The bequest of 500*l.* to each of the children of Elizabeth Morey, having regard to the value of the testator's estate at the time, appeared to be rather more than the aliquot share which Elizabeth Morey would have taken if, being alive at the date of the will, she had been included amongst the children of the testator who were to take a share of residue.

This was an adjourned summons raising the question whether the children of Elizabeth Morey who being sons attained twenty-one, or being daughters attained that age or married, were entitled between them to a share of the residue.

R. M. Pattisson, for the summons.

G. T. Simonds (*Austen-Cartmell* with him), for the children of Elizabeth Morey. The present case is indistinguishable from *In re Williams* (1), where the Court of Appeal, affirming Sargant J., held that the children of a son who was dead at the date of the will were entitled to share in the residue under a proviso almost identical with the proviso in the present case. The gift in favour of the children of Elizabeth Morey is an alternative rather than a purely substitutional gift, and the words " shall die in my lifetime " can be properly read as equivalent to " shall be dead " or " shall have died." [He also referred to *Loring* v. *Thomas* (2), *Barraclough* v. *Cooper* (3), and *In re Potter's Trust.* (4)]

The children of Elizabeth Morey are therefore entitled to the share of residue which she would have taken if she had survived the testator notwithstanding that she was dead at the date of the will.

W. R. Sheldon, for the other children of the testator. There is no general rule that the words " shall die " are to be read as " shall be dead " or " shall have died " in this connection. On the contrary the words " shall die " are prima facie words of futurity, though they are liable to be controlled by the language of each particular will. In the original gift of the residue in the present case the testator has distinguished between the past and the future by the use of the words " shall have attained or shall hereafter attain " twenty-one where the circumstances required it, and, if he had intended it, would presumably have used similar language in the proviso. Moreover, in the present case the testator has already provided for the children of Elizabeth Morey by an independent bequest, and it would be a case of double portions under the existing circumstances if the will were so construed as to give them a share of residue in addition. The present case closely resembles *In re Gorringe* (1), where the House of Lords approved the decision of Joyce J. and the dissentient judgment of Romer L.J. and reversed the decision of the majority of the Court of Appeal. There is nothing in *In re Williams* (2) which compels the Court to adopt a construction of the will in the present case which is contrary to the natural interpretation of the language used, and Elizabeth Morey having died prior to the date of the will her children are not entitled to any share of the residue.

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(1) [1914] 1 Ch. 219; on appeal [1914] 2 Ch. 61.

(2) (1861) 1 Dr. & Sm. 497.

(3) (1905) [1908] 2 Ch. 121, n.

(4) (1869) L. R. 8 Eq. 52.

Cur. adv. vult.

May 16. YOUNGER J. delivered a written judgment in which, after referring to the state of the testator's family, he continued: In these circumstances the testator made his will. By that will he gave the sum of 500*l.* to each of the six children of his deceased daughter Elizabeth Morey specifically referring to her as being dead. The question is whether these children are entitled under the further terms of his will to take any interest in his residuary estate. That residue the testator disposed of in the following terms. [His Lordship read the gift of residue in the will and continued :] Now, construing these clauses as it is my duty in the first instance to do without reference to any authorities dealing with the construction of like provisions in other wills, I observe that in the original gift to the testator's children—a gift, of course, confined to children alive at the date of the will or thereafter to be born and not extending to any child then dead—the testator provides that a son is to take who has "attained or shall hereafter attain the age of twenty-one years" and that a daughter is to take who has "attained or shall hereafter attain the age of twenty-one years or shall marry" in equal shares. The word "shall" as there used plainly relates to the future and to the future only. One can therefore so far find no support for the view that this testator is using the word in other than its natural sense of futurity. Proceeding now to the proviso and still construing the words there used according to the ordinary meaning of language, and continuing to attribute to the word "shall" the sense of futurity which it so clearly bears in the original gift, the testator would in terms appear to be disposing only of the share of a child who shall thereafter die in his lifetime and to be providing that the child or children of that child surviving the testator and attaining the age of twenty-one years, or being a daughter marrying, shall take, and if more than one equally between them, the share under the original gift which his, her, or their parent would have taken of and in the residuary trust funds, if such parent had in accordance with the terms of the gift survived the testator and had attained the age of twenty-one years. In other words, as Lord Macnaghten said of a similar clause in the case of *Gorringe* v. *Mahlstedt* (1), the gift in the proviso is simply a substitutional gift and not an independent gift to all the testator's grandchildren ; or, putting it otherwise, no child of a child of the testator who was dead at the date of his will, and who therefore could himself have in no circumstances taken anything under the will, is to take any interest in the residue. Now in my opinion that is the natural construction of the will having regard to the words which the testator has used as applied to the circumstances of his family at the date when the will was made. It results in a perfectly natural and equal division of his property. Only one of his children, as I have said, was dead at that time, and for the children of that child the testator specially provides by bequeathing to each of them the sum of 500*l.*, a sum which as it happens, having regard to the value of the testator's estate at the time, would appear to be rather more than the aliquot share which their mother would have taken if, being alive at the date of the will, she had been included amongst the children of the testator who were to take a share of his residue. The natural construction of the will therefore does not leave any grandchildren of the testator unprovided for. What it does do is to prevent these particular grandchildren taking without any apparent reason a double portion of the testator's estate. Furthermore, the literal construction neither excludes a son or a daughter of the testator who had attained twenty-one at the date of the will, nor does it exclude any grandchild of the testator fulfilling the required conditions and being a son or daughter of a child of his then living but subsequently dying in his lifetime, because no one of the testator's

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(1) [1906] 1 Ch. 319; [1906] 2 Ch. 341; in House of Lords sub nom. *Gorringe* v. *Mahlstedt* [1907] A. C. 225.

(2) [1914] 1 Ch. 219; on appeal [1914] 2 Ch. 61.

(1) [1907] A. C. 225.

grandchildren had at the date of his will attained the age of twenty-one years, and therefore that event could with regard to them, both exhaustively and accurately, be spoken of as an event in the future.

It is, however, suggested that I am compelled by authority to place upon the words of this will a meaning different from that which they would appear naturally to bear, and the case of *Loring* v. *Thomas* (1) and many which have succeeded it are relied on for that purpose. And it is true that in these and similar cases the Courts, for the purpose of including amongst a class of children or grandchildren, originally of other persons, and later of the testator himself, persons who were presumably within the range of the testator's bounty, have attributed to certain phrases and expressions a signification which they do not naturally bear. They have treated clauses like the proviso in the present case as an original gift, seizing upon such words as " any children of me " as extending to all children whether then dead or alive, and reading such words as " the share which such parent would have taken if living " as being a share not which such parent under some other gift in the will could or might subject to certain conditions have taken, but as being a share which it is presumed the testator would have contingently given to that parent had he been living, but which he did not give to him at all because he was then dead. Particularly, however, and with the same purpose in view, has the Court in such clauses attributed to the word " shall " a meaning which it does not naturally bear. But, as Joyce J. says in *In re Gorringe* (2), *Loring* v. *Thomas* (1) " shows that words of futurity may be read as applying to the past, but there is no rule that they shall be so read." Indeed the construction so adopted is benevolent, and the limits for its proper application are clearly defined in the case of *Gorringe* v. *Mahlstedt* (3), and it is not to be resorted to without sufficient reason. That reason was found in *In re Williams* (4), which is the strongest case in Mr. Simonds' favour and was mainly relied upon by him. If, however, in that case the Court had attributed to the word " shall " its ordinary future signification, the result would have been to exclude from the class entitled to participate persons whom the testator in the opinion of the Court clearly intended to include. Such a result does not follow here.

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(1) 1 Dr. & Sm. 497.

(2) [1906] 1 Ch. 322.

(3) [1907] A. C. 225.

(4) [1914] 1 Ch. 219.

On the contrary, as I have already said, to place upon the word in this will any other than its primary signification would have the effect, without any apparent reason, of giving a double portion to that set of the testator's grandchildren who in the other cases, unless that construction had been adopted, would have been excluded altogether. It is not such cases, but such a decision as that in *Gorringe* v. *Mahlstedt* (1), to which I was referred by Mr. Sheldon, that appears to me to be nearest the present case, and justifies completely the conclusion at which I have arrived without reference to authority. To this will, as to the will in that case, the observations of Romer L.J. (2), approved of by Lord Macnaghten (3) in the House of Lords, may surely be applied: "There is absolutely nothing in this will which enables the Court to depart from the natural and first meaning of the words used." Indeed, I might go further and say that there is every reason in this case to induce the Court to adhere to that meaning.

Solicitors: *Lovell, Son & Pitfield, for Nantes & Maunsell, Bridport.*

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(1) [1907] A. C. 225. (2) [1906] 2 Ch. 350.
(3) [1907] A. C. 228.

A. C.

In re BOGG.

ALLISON *v.* PAICE.

[1916 B. 2822.]

SARGANT J.
1917
Feb. 15, 20, 21; *March* 7.

Conversion—Devise in strict Settlement—Successive Life Estates—Trust to invest Proceeds of Sale in Purchase of Freeholds or in Personalty—Power to vary—Consent of Tenant for Life—Investment on Mortgage—Deaths of Remaindermen—Foreclosure—Settlement of Foreclosed Land—Reconversion—Time for determining Rights of Remaindermen—Trust for Sale of Foreclosed Land—Conveyancing Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 37), *s.* 9*—Retrospective Operation.*

A testator who died in 1861 devised his real estate in strict settlement and empowered the trustees, with the consent of the tenant for life, to sell the same or any part thereof, and directed them with such consent to invest the proceeds of sale in the purchase of freehold land or in the public funds or on real securities to be respectively settled and held to and upon such uses and trusts corresponding as nearly as might be with the uses and trusts therein declared concerning the land sold, with power for the trustees from time to time with the like consent to vary such investments.

In the events which happened the material limitations of the will resulted as follows:—To the use of E., T., and J. successively for life in the order named, with remainder to the use of E., T., and J. as tenants in common in tail general, with cross-remainders between them in tail general, with remainders over. In 1867 part of the land was sold and the proceeds invested in mortgage of freehold land. In 1871 E. died leaving an only daughter. In 1881 T. died a bachelor. In 1898 the surviving trustee foreclosed, and in 1899, by a deed appointing a new trustee to which J. was party, the foreclosed land was conveyed to the uses and upon the trusts of the will as if the same had been thereby specifically devised.

On the death of J. in 1916 without issue, his executrix, who was also executrix of T., claimed that the foreclosed land in fact represented personalty and was subject to a trust for sale by virtue of s. 9 of the Conveyancing Act, 1911, and that she was entitled to two-thirds of the proceeds. The only daughter of E. claimed the foreclosed land as tenant in tail under the limitations of the will, E., T., and J. never having disentailed:—

Held: (1.) That, owing to the power to vary investments, the crucial time for determining the character of each investment was the death of J., the surviving tenant for life, and that the mortgages having been then foreclosed the mere foreclosure operated as a reconversion of the property into realty, and that there was no equity on the part of any cestui que trust under the will to have the personal character of the investment restored to it.

The principle of *Lawes* v. *Bennett* (1785) 1 Cox, 167, and *In re Isaacs* [1894] 3 Ch. 506 applied.

(2.) That by the deed of 1899, to which all the parties able to control the character of the investment of the trust fund were parties, the foreclosed land was duly adopted as real estate and settled to the uses of the will;

(3.) That, although sub-s. 5 of s. 9 of the Conveyancing Act, 1911, may apply to land foreclosed before the commencement of the Act and remaining at the passing of the Act in the condition determined by the foreclosure, it would be unreasonable to extend the retrospective operation of the section to a case like the present where previously to the commencement of the Act the foreclosed land had been definitely accepted and settled as land and rights acquired thereby;

(4.) That even if, by virtue of sub-s. 5, s. 9 of the Act was to be deemed to apply to foreclosed lands as from the date of foreclosure, the terms of both sub-s. 3 and sub-s. 4 had in the present case been complied with sufficiently to prevent the reconversion of the land into money under sub-ss. 1 and 2 of the section; and

(5.) That the foreclosed land had become legally vested in the daughter of E. in tail as the heir in tail of E.

BY his will, dated July 26, 1860, the testator, Edward Bogg, devised his real estate in manner following:—One moiety or equal half-part of his estate at Alvingham in the county of Lincoln to the use of his nephew John Bogg and his assigns during the term of his natural life, and after his decease to the use of Edward Beverley Bogg (the eldest son of the said John Bogg) and his assigns during the term of his natural life without impeachment of waste, and after his decease to the use of his sons successively according to their respective seniorities in tail male, and for default of such issue to the use of Thomas Wemyss Bogg (the second son of the said John Bogg) and his assigns during the term of his natural life without impeachment of waste, and after his decease to the use of his sons successively according to their respective seniorities in tail male, and for default of such issue to the use of John Stuart Bogg (the third son of the said John Bogg) and his assigns during the term of his natural life without impeachment of waste, and after his decease to the use of his sons successively according to their respective seniorities in tail male, and for default of such issue to the uses hereinafter mentioned.

The other moiety of his estate at Alvingham the testator devised on similar limitations, except that after the decease of John Bogg the first estates for life and in tail male were respectively limited to the use of T. W. Bogg and his sons, the second to E. B. Bogg and his sons, and the third to J. S. Bogg and his sons, the remainders over for default of J. S. Bogg's male issue being as hereinafter mentioned.

The testator devised his estate at Benniworth and Donington-on-Bain in the county of Lincoln on similar limitations, except that after the decease of John Bogg the first estates for life and in tail male were respectively limited to the use of J. S. Bogg and his sons, the second to E. B. Bogg and his sons, and the third to T. W. Bogg and his sons, the remainders over for default of T. W. Bogg's male issue being as hereinafter mentioned.

The Alvingham estate and the Benniworth and Donington-on-Bain estate were limited in remainder on default of all such male issue as above mentioned in manner following:—To the use of E. B. Bogg, T. W. Bogg, and J. S. Bogg as tenants in common in tail general, with cross-remainders between and among them in tail general, and if all the testator's said great-nephews except one should die without issue, to the use of such only remaining great-nephew in tail general, and for default of such issue to the use of the children of the testator's late cousin William Bogg and their heirs and assigns for ever as tenants in common.

For the purpose of preserving the contingent remainders thereinbefore created the estates were then devised to the use of A. T. Rogers and J. R. King during the life of the tenant for life whose estate should determine by forfeiture or otherwise.

Then followed a provision in the usual form enjoining on every person becoming entitled to an estate for life or in possession or the husband of every such person who should not previously have the surname of Bogg to apply for and obtain the Royal licence or authority to use that surname within the time therein mentioned, with a clause providing for the cesser and determination of the estate of the person failing or neglecting to comply with that provision and the acceleration of the remainders expectant thereon, with a devise to the trustees for the purpose of preserving such remainders if contingent.

Then followed a direction for the entry into possession of the trustees during the minority of any person entitled to possession, and for the maintenance of such minor out of the rents and profits, and for the ultimate investment of the accumulated surplus rents in the purchase of freehold estates to be settled to the like uses, the interim investments being made in the funds or on real securities.

The will then gave to the trustees, with the consent in writing of the person or persons for the time being entitled to any hereditaments for life or in tail, or during minorities at the discretion of the trustees, powers of partition, exchange and sale, and directed that the moneys for equality of exchange or partition, purchase-moneys, and other sums to be received upon the exercise of any such power should with such consent or at such discretion as aforesaid be invested by the trustees in the purchase of freehold or copyhold hereditaments in England or Wales in fee simple, or held upon renewable lease for lives or years or for any absolute unexpired term of not less than ninety-nine years, or in the public stocks or funds or on real securities in England or Wales, "to be respectively settled and held to and upon such uses and trusts corresponding as nearly as may be with the uses and trusts herein declared concerning the hereditaments in respect of which such monies shall have been received with power for my said trustees or trustee from time to time with such consent or at such discretion as aforesaid to vary such investments."

The testator then directed that his Alvingham estate should be liable to pay one half of a mortgage for 2000*l.* to which his estate at Benniworth and Donington-on-Bain was subject and which was secured by a mortgage term of 1000 years, and empowered his trustees to raise such sum of 1000*l.* by mortgage or sale of the whole or any part of the Alvingham estate.

The testator empowered the executors or administrators of any deceased trustee by any writing to nominate a new trustee for the purpose of filling the vacancy caused by such death.

By a codicil dated November 19, 1860, the testator revoked the ultimate remainder in fee simple to the use of William Bogg and substituted therefor an ultimate remainder to John Bogg, his heirs and assigns.

The testator died on January 7, 1861, and John Bogg died in 1866. In 1867 the Alvingham estate was sold with the consent of

E. B. Bogg and T. W. Bogg, and the proceeds of sale, amounting to some 12,500*l.*, were invested in two sums of 7000*l.* and 5500*l.* on mortgages of freehold land at Marshchapel in the county of Lincoln.

In March, 1871, E. B. Bogg died leaving an only child, Constance Beverley Bogg, now the defendant Mrs. Paice. He devised and bequeathed his residuary estate in trust for his wife for life and after her death for her daughter absolutely.

In 1877 the mortgage for 5500*l.* was paid off, and 3500*l.* was re-invested on mortgage of freehold land at South Reston, Lincolnshire. Of the remaining 2000*l.*, 1000*l.* was applied in discharging one half of the mortgage on the estate at Benniworth and Donington-on-Bain pursuant to the direction in the will, and the other 1000*l.* was also paid to the same mortgagees, and the trustees of the testator's will took a transfer of the mortgage debt remaining unpaid and an assignment of the 1000 years term securing the same.

In 1881 T. W. Bogg and A. T. Rogers died. The former appointed his mother and his brother J. S. Bogg his executors and gave all his real and personal estate to his mother, who died in 1883 having appointed J. S. Bogg her executor, to whom she gave all her real and personal estate.

In February, 1898, J. R. King, the surviving trustee of the testator's will, obtained foreclosure orders absolute in respect of the mortgaged properties at Marshchapel and South Reston.

By an indenture dated November 4, 1899, and made between the executors of A. T. Rogers, the deceased trustee, of the first part, J. R. King of the second part, J. S. Bogg of the third part, the plaintiff of the fourth part, and J. R. King and the plaintiff of the fifth part, after recitals stating the material parts of the will and codicil of the testator, the deaths of parties, and the dealings with the proceeds of sale and mortgage securities and the foreclosure orders above set out, and that the parties were desirous that the plaintiff should be appointed a new trustee of the property devised by the will or the proceeds of sale thereof, and that the charge for 1000*l.* and term of 1000 years in the Benniworth estate should be surrendered and the charge should cease and determine, the parties thereto of the first part, at the request of J. S. Bogg "in pursuance of the power contained in the said will and of all statutory or other powers (if any) him hereunto enabling," thereby appointed the plaintiff a trustee of the will jointly with J. R. King, and in consideration of the premises J. R. King thereby granted and conveyed the foreclosed lands unto J. R. King and the plaintiff and their heirs, to have and to hold the same unto them, their heirs and assigns," to such uses upon such trusts and with under and subject to which the same ought henceforth to be held under or by virtue of the will and codicil of the said testator in the same way as if all such premises had been thereby specifically devised and" the plaintiff "had been originally appointed a trustee thereof instead of the said Alexander Tallents Rogers deceased." By the third and next testatum J. R. King, at the request of J. S. Bogg, assigned and surrendered to the latter the hereditaments comprised in the mortgage term of 1000 years to the intent that the term might thenceforth merge and be extinguished and the hereditaments be freed and discharged from the principal sum of 1000*l.* Then followed a declaration by the parties of the first part vesting in the plaintiff and J. R. King, their heirs and assigns, all the hereditaments devised by the will (except the estate at Alvingham) for such estate and interest as J. R. King had therein immediately before the execution of those presents, upon the trusts and subject to the powers and provisions applicable thereto respectively by virtue of the said will and codicil or otherwise.

J. R. King died on February 6, 1904. On January 21, 1916, J. S. Bogg died, having appointed his wife and the defendant Mrs. Horn his executors. They duly proved his will, and his widow died in March, 1916.

In February, 1916, the defendant Mrs. Paice executed a disentailing deed relating to the real estate devised to her by the testator's will, and on October 7, 1916, executed a further deed disentailing specifically the foreclosed lands at Marshchapel and South Reston, and she now claimed to be entitled to those lands in fee simple. The defendant Mrs. Horn claimed that the foreclosed lands in reality represented personalty and were subject to a trust for sale, and that she as legal personal representative of the two deceased tenants in common in tail, T. W. Bogg and J. S. Bogg, was entitled to two thirds of the net proceeds of sale.

This was a summons by the trustee of the testator's will for the determination of the following questions :—(1.) Whether the foreclosed lands had by virtue of s. 9 of the Conveyancing Act, 1911, become and were subject to a trust for sale, and whether the net proceeds of sale were applicable in like manner as the mortgage debts, if received, would have been applicable; or (2.) whether, in the events which had happened, the said lands had become subject to the use of E. B. Bogg in tail general; and (3.) whether by virtue of the deed of November 4, 1899, the foreclosed lands were legally vested in the plaintiff or in the defendant Mrs. Paice, and what was the effect of the said deed in relation to the same lands.

A. M. Begg, for the plaintiff, stated the facts.

Romer, K.C., and *R. J. A. Morrison*, for the defendant Mrs. Paice. This is a strict real property settlement with limitations applicable exclusively to real estate, and there is a series of cases which shows that in those circumstances where there is an option to invest proceeds of sale or moneys in either real or personal estate then an investment in personal estate under that option must be regarded as an interim investment only: *Earlom* v. *Saunders* (1); *Cowley* v. *Hartstonge* (2); *Johnson* v. *Arnold* (3); *Cookson* v. *Reay* (4); *Hereford* v. *Ravenhill.* (5) In *Rich* v. *Whitfield* (6) the real estate was sold and the proceeds, invested in personal estate, were held to have vested absolutely in an infant tenant in tail, but that was a clear case, and none of the earlier authorities were cited. *Atwell* v. *Atwell* (7) was not a satisfactory decision in face of the earlier cases, and in *In re Bird* (8) leaseholds are mentioned as an investment, and there was not in that case an imperative trust for investment in realty. *In re Walker* (9) and *In re Aspinall's Settled Estates* (10) only show that there must be an imperative trust for investment in land if personalty is to be regarded as converted.

[SARGANT J. I was always puzzled by the decision in *In re Walker.* (9) The earlier decisions do not appear to have been cited in argument. I have no doubt that in that case the direction in the will was intended to be a trust for investment in realty.]

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(1) (1754) Amb. 241.
(2) (1813) 1 Dow, 361.
(3) (1748) 1 Ves. Sen. 169.
(4) (1842) 5 Beav. 22; (1845) 12 Cl. & F. 121.
(5) (1842) 5 Beav. 51.
(6) (1866) L. R. 2 Eq. 583.
(7) (1871) L. R. 13 Eq. 23.
(8) [1892] 1 Ch. 279.
(9) [1908] 2 Ch. 705.
(10) [1916] 1 Ch. 15.

On the terms of the will in this case and on the authorities we submit that there was an imperative trust for reconversion into land, and that, as none of the tenants in common in tail disentailed, the proceeds of sale descended to the defendant Mrs. Paice as tenant in tail.

Assuming, however, that there is no imperative trust for reconversion, then we submit that the trustees, with the consent of the tenant for life, had a discretionary power to vary the investment, and that that is a power which continues under the settlement, at any rate until the death of the last tenant for life, and that the rights of those taking in remainder are in suspense until after that event and the property is at home: *Cowley* v. *Hartstonge* (1); *Cookson* v. *Reay* (2), where Lord Cottenham refers to this effect of the discretionary power of the trustees. In *Lantsbery* v. *Collier* (3) it was held that their discretionary power of sale could be exercised by the trustees during the life of the tenant for life although the result of the exercise of the power was to alter completely the devolution of the property, and the decison in *In re Isaacs* (4) applying the principle of *Lawes* v. *Bennett* (5) points to the same result. The trustees, therefore, in the exercise of their discretion and with the consent of the tenant for life, had power to treat the foreclosed land as real estate, and they did in fact so treat it and settle it by conveying it by the deed of November 4, 1899, to the uses of the will as if it had been thereby specifically devised. We submit that that is the true construction and effect of that deed. The trustees thereby duly reconverted the property just as in *Cookson* v. *Reay* (6) the beneficiaries altered the character of the property.

Further, at the date of the execution of this deed all the property, whether land or proceeds of sale, stood limited or was subject by way of succession to and upon the same uses and trusts. There was, therefore, a settlement within the meaning of the Settled Land Act, 1882, s. 2, sub-s. 1, under which John Stuart Bogg was the tenant for life. The trustees had power to invest the proceeds of sale of the Alvingham estate in the purchase of freehold land; those proceeds therefore were moneys "liable to be invested in

(2) 1 Dow, 361.
(2) 12 Cl. & F. 121.
(3) (1856) 2 K. & J. 709, 723.
(4) [1894] 3 Ch. 506.
(5) 1 Cox, 167.
(6) 5 Beav. 22; 12 Cl. & F. 121.

land" within the meaning of s. 33 of the Settled Land Act, 1882—*In re Hill* (1); *In re Soltau's Trusts* (2)—and could at the option of the tenant for life be required by him to be invested or applied as capital moneys arising under the Act. He therefore had power to direct the trustees to invest these moneys in the purchase of land to be settled to the uses of the settlement in compliance with s. 24, and could, in fact, have purchased this foreclosed land from the trustees and have then directed them to invest the capital moneys in it and settle it under the Act. Instead of going through that form they have settled the land direct. In the deed he is expressed to be acting in exercise of every power, statutory or otherwise, enabling him, and that must be taken to include his power under the Settled Land Acts. That he was acting under his statutory powers appears from the surrender of the 1000 years' term. For, apart from his statutory power to direct the application of the proceeds of sale in discharge of this incumbrance, neither he nor the trustees had power to pay it off and surrender the mortgage term.

Therefore not only under the powers conferred by the will upon the trustees, but also under the statutory powers of the tenant for life, we submit that this foreclosed property has been duly settled as land and has so devolved. The state of circumstances contemplated by sub-s. 4 of s. 9 of the Conveyancing Act, 1911, afford an exact illustration of what has taken place in the present case.

A. Grant, K.C., and *T. K. Nuttall*, for the defendant Mrs. Horn. There is nothing in the will to show that the power to invest the proceeds of sale in stocks or securities was for the purposes of an interim investment. On the contrary, the power of exchange expressly authorizes the exchange of freehold lands for leaseholds, and the trust for the investment of accumulations during minorities, while permitting interim investment in personalty, directs an ultimate investment in realty; but there is no element of temporary investment discoverable in the case of proceeds of sale, and there is nothing to show that personalty or leaseholds taken in exchange for freeholds were to be reconverted. There has been a conversion of realty into personalty, and personalty it must remain: *Walker* v. *Denne.* (3)

(1) [1896] 1 Ch. 962. (2) [1898] 2 Ch. 629.
(3) (1793) 2 Ves. Jun. 170.

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Earlom v. *Saunders* (1) and *Cowley* v. *Hartstonge* (2) were explained by the House of Lords in *Evans* v. *Ball* (3) and have no application to this case. In *Johnson* v. *Arnold* (4) it was necessary to hold that the property was realty so as not to defeat the legatees. In *Rich* v. *Whitfield* (5) the estate of the infant tenant in tail was held entitled to the proceeds of sale. *Atwell* v. *Atwell* (6) is indistinguishable from this case and is precisely in point, and shows that to get over the consequence of the conversion from realty into personalty there must be a trust for reconversion. There is no such trust in this case, but the personalty is expressly directed to be settled and held upon trusts corresponding as nearly as may be to the limitations of the will. This foreclosed land which represents the proceeds of sale therefore still retains its character of personalty and devolved as personalty.

Next, with regard to the power to vary investments and the effect of the deed of November 4, 1899. At the date of that deed the last tenant for life was alive and the next remainders were to his sons in tail male, with remainder to himself and his two brothers as tenants in common in tail general, with cross-remainders between them. At that date the property in question had still the character of personalty.

[Sargant J. That is the question. It would have been personalty if it had remained on mortgage, but the security had been foreclosed.]

But the trustees held the foreclosed land subject to an implied trust for sale.

[Sargant J. It was accepted as realty, and in the deed they dealt with it as such.]

But the recital shows that their object was to appoint new trustees of the property, and the deed ought to have vested it in the trustees. The deed does convey the property "upon such trusts," &c., and we submit that the property was granted to them qua trustees. The grant is not expressed to be at the request of John Stuart Bogg, and the absence of a request by him in this conveyance, the effect of which was to change the nature of the property, is very significant and shows that there was no intention to vary the character of the property.

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(1) Amb. 241.

(2) 1 Dow, 361.

(3) (1882) 47 L. T. 165; 30 W. R. 899.

(4) 1 Ves. Sen. 169.

(5) L. R. 2 Eq. 583.

(6) L. R. 13 Eq. 23.

[Sargant J. I should feel no difficulty if it were the case of a personal property settlement, because then the foreclosed land must have been sold, but it is altogether different in the case of a real property settlement where the trustees have an option to vary the investments and power to hold land.]

The foreclosed land should have been sold as soon as possible and the character of the property retained as personalty: *In re Tollemache.* (1) As personalty, John Stuart Bogg would have been absolutely entitled to two thirds of the proceeds of sale at his death, and it would have been against his interest to deprive himself of his property by altering the character of it into realty. There must be clearer evidence than there is of his intention so to deprive himself.

The provisions of s. 9 of the Conveyancing Act, 1911, are conclusive of this case. By sub-s. 5 the section is made applicable to property foreclosed before the commencement of the Act, and, accordingly, this property as soon as it was foreclosed became by virtue of sub-s. 1 subject to a trust for sale, and the proceeds of sale are by virtue of sub-s. 2 applicable in like manner as the mortgage debt if received would have been. The effect of those statutory provisions is to retain the character of personalty which attached to the original investment of the proceeds of sale of the Alvingham estate. Sub-s. 3 of s. 9 is not operative, because there was no such person as is therein referred to.

[Sargant J. But that sub-section would include a person, such as a tenant for life, who had a right to direct how the property was to be held.]

We submit not, and that it only refers to an absolute owner. That seems to be the view taken in the comments on this sub-section in Wolstenholme's Conveyancing and Settled Land Acts, 10th ed. p. 201.

Further, with regard to sub-s. 4 of s. 9, these were not capital moneys arising under the Settled Land Acts, 1882 to 1890, nor were they, we submit, capital moneys for the purposes of those Acts. That sub-section contemplates capital moneys realized under the

(1) [1903] 1 Ch. 457, 461.

powers of the Acts, which these moneys were not; and the mere fact that the trustees might have bought land with them does not make the proceeds of sale capital money for the purposes of the Acts. But, even assuming that they were, sub-s. 4 of s. 9 of the Conveyancing Act, 1911, is not so retrospective as to enable a tenant for life in 1899 to require the foreclosed land to be conveyed in manner contemplated by the sub-section. The deed of 1899 does not expressly state that he was exercising his powers under the Settled Land Acts, and we submit that, notwithstanding that deed, this foreclosed land is still of the nature of personalty and consequently subject to a trust for sale.

Romer, K.C., in reply. I will not further pursue the contention that there was an imperative trust for investment in land. But I submit that s. 9 of the Conveyancing Act, 1911, is retrospective only so far as by sub-s. 5 it applies to property foreclosed either before or after the Act; the section is not intended to annul transactions completed before the Act came into operation, or to impose a trust for sale until the commencement of the Act. It cannot apply to this transaction which was completed in 1899. In sub-s. 1 " vested in trustees by way of security " refers to the time when the Act comes into operation, and does not prejudice any previous dealing with the land; it contemplates that the trustees are still holding the land by virtue of the foreclosure and independently of any intermediate transactions, and in that event it enacts that the land " shall " be held by them on trust for sale.

Cur. adv. vult.

March 7. SARGANT J. The substantial question here is whether at the death on January 21, 1916, of John Stuart Bogg, the last tenant for life, certain freehold hereditaments which were subject to the limitations or trusts of the testator Edward Bogg's will, and which represented two mortgage debts subject to that will which had been foreclosed, ought to be regarded in equity as of the nature of real estate or of the nature of personal estate. In the former case the entirety of these hereditaments would have belonged to the defendant Constance Beverley Paice for an estate of inheritance in fee tail which was subsequently enlarged to a fee simple under a disentailing assurance executed by her on October 7, 1916. In the latter case, she would be entitled to a third of the hereditaments only subject to her mother's life interest, and the remaining two thirds thereof would belong to the defendant Helen Horn as the executrix of John Stuart Bogg. The determination of the question depends partly on the terms of the will of the testator Edward Bogg and partly on the effect of an indenture of November 4, 1899, and partly on the result of the express provisions as to foreclosed mortgaged property which are to be found in s. 9 of the Conveyancing Act, 1911.

The material facts are as follows: By the will dated July 26, 1860, of Edward Bogg he devised one moiety or equal half part of his estate situate at Alvingham in the county of Lincoln to the use of his nephew John Bogg, of Louth, for the term of his natural life, and after his decease to the use of Edward Beverley Bogg, the eldest son of the said John Bogg, and his assigns during his life, and after his decease to the use of his sons successively according to their respective seniorities in tail male, and in default of such issue to the use of Thomas Wemyss Bogg (the second son of the said John Bogg) during the term of his natural life, and after his decease to the use of his sons successively according to their respective seniorities in tail male, and for default of such issue to the use of John Stuart Bogg (the third son of the said John Bogg) and his assigns during the term of his natural life, and after his decease to the use of his sons successively according to their respective seniorities in tail male, and for default of such issue to the use of the said Edward Beverley Bogg, Thomas Wemyss Bogg, and John Stuart Bogg as tenants in common in tail general, with cross-remainders between and among them in tail general, with remainder over; and then the testator devises the second moiety of his estate at Alvingham substantially to similar uses except that the limitations to Thomas Wemyss Bogg and his sons successively in tail male were placed in front of instead of behind the limitations in favour of Edward Beverley Bogg for life and his sons in tail male. Then the testator settled certain hereditaments of his at Benniworth and Donington-on-Bain to the use of John Bogg for life, with remainder to the use of the third son of John Bogg, John Stuart Bogg, for life, with remainder to his sons in tail male and over. I need not refer more particularly to the limitations of that property. Then, for the purpose of preserving the contingent remainders, he gave the hereditaments limited to any person during the term of his natural life immediately after the determination of that estate by forfeiture or otherwise unto and to the use of his trustees during the life of the tenant for life.

Then there was an elaborate clause, a clause for the maintenance of infants during minorities, and a provision for the investment of surplus rents in real estate and interim investments on personal investments. Then there was a power of partition, exchange, and enfranchisement and sale in the usual form, except that all those powers were grouped together, and then came an important direction on which the question before the Court turns to a considerable extent—that any moneys received for equality of exchange on a partition or on a sale should be, with the consent or at the discretion of the tenant for life or the trustees, " invested by my trustees or trustee in the purchase of such hereditaments as are hereinbefore authorized to be taken in exchange or in the public stocks or funds or on real securities in England or Wales to be respectively settled and held to and upon such uses and trusts corresponding as nearly as may be with the uses and trusts herein declared concerning the hereditaments in respect of which such monies shall have been received with power for my said trustees or trustee from time to time with such consent or at such discretion "—that is, discretion during minority—" as aforesaid to vary such investments."

Then the will contained a direction under which a mortgage of 2000*l*. which existed on his estates at Benniworth was to be cast, as to half (1000*l*.), on to his estates at Alvingham. I think that is all that I need refer to in the will. The testator made a codicil to his will which affected the ultimate remainder in his real estates, and which I need not deal with more particularly.

The testator died on January 7, 1861, and in the year 1867 the Alvingham estates were sold, and after some interim change of investment 1000*l*. was used in paying off half the mortgage on the Benniworth estates, as provided by the will, and the remaining money—I think amounting to some 10,000*l*. in all—was invested upon two mortgages of freehold estates in Lincolnshire. The first tenant for life, E. B. Bogg, died on March 1, 1871 (that was after the sale of the Alvingham estates), and he left one child only, who is the defendant Mrs. Paice. On his death of course the second tenant for life, Thomas Wemyss Bogg—I have omitted John Bogg the father, who died either before the testator or soon after—entered into the possession of the income of the mortgages, and he died on February 13, 1881, without issue. Thereupon John Stuart Bogg, who was already in possession of the Benniworth estates, became entitled in possession to the income of the mortgages as well. In the year 1898 the trustees foreclosed the equity of redemption in the two properties which had been mortgaged to him, and I assume that those proceedings were properly taken by the trustees with the knowledge and assent of the tenant for life. They are referred to in the indenture which I am next going to mention, and are referred to without any dissent, and I think it must be taken they were perfectly proper. Then in the year 1899 there was an important deed by which new trustees were appointed and certain other matters were dealt with, which I will refer to more in detail at a later stage.

On January 21, 1916, John Stuart Bogg died, and if, as I have said, these foreclosed properties were to be considered as of the nature of real estate, the effect would have been that by virtue of the cross-remainders they would all have become united together and would have vested in Mrs. Paice for an estate in tail. If, on the other hand, they were of the nature of personal estate, the trusts similar to the trusts of the real estate could not carry them further than the limitation to the three sons in tail general; and the result would be that by virtue of certain wills to which I need not refer Mrs. Paice would take one third and Mrs. Horn would take the remaining two thirds.

Now the first argument in favour of the property foreclosed being of the nature of real estate was this: that this settlement that was affected by the will was to be treated as a real estate settlement and that any investment in personalty was provisional only, and that such personalty would retain the character in equity of real estate, so that the mortgages themselves, if they had remained mortgages and had not been foreclosed, would still have had to be considered as real estate. Of course, if it was the fact that foreclosure had taken place that could not make them less real estate than they were already. In support of that argument the case of *Earlom* v. *Saunders* (1) was referred to,

(1) Amb. 241.

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and also a case of *Cowley* v. *Hartstonge* (1), but as is shown by the comments on those cases in *Evans* v. *Ball* (2), which is a decision of the House of Lords, it is clear that those cases really depend upon the Court finding that the investment in personalty under the settlement in question was a temporary or interim investment only. Here there is no indication at all that an investment of the proceeds of sale under the special power in that discretion was to be of a temporary nature only. Indeed, that view is precluded by the express provision in the will that personalty is to go to uses and upon trusts " corresponding as nearly as may be " with the uses and trusts of the real estate. I think that express trust negatives all implications as to the property being held as realty, and that express trust must be given effect to, as indeed is habitually done when in the case of the settlement of large real estates power is given to invest upon leaseholds for long terms of years that are convenient to be held with the real estate. In those cases it is always held that the leaseholds so purchased will vest in the first tenant in tail, apart from express provision to the contrary in the settlement.

Ultimately, after the matter had been argued at some length and a good many cases referred to, Mr. Romer withdrew from the position that the settlement was to be considered as so clearly a real estate settlement that the mortgages themselves, apart from foreclosure, would have to be treated as real estate. And I have therefore to deal with the case upon the admitted basis that there is nothing in the settlement to prevent the trust funds being either of the nature of real estate or of the nature of personal estate, and that the actual state of investment of each item is to be regarded. Further, it was agreed by counsel on both sides that the crucial time for determining the character of each investment must be (in the events which have happened) the death of John Stuart Bogg, since down to that time the position or character of the funds might from time to time change, as was in fact the case with the mortgages in question. This is entirely in accordance with the principle of such cases as *Lawes* v. *Bennett* (3) and *In re Isaacs.* (4)

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(1) 1 Dow, 361.

(2) 47 L. T. 165; 30 W. R. 899.

(3) 1 Cox, 167.

(4) [1894] 3 Ch. 506.

This being so, it seems to me that prima facie, and even apart from the indenture of 1899, the foreclosed hereditaments have to be considered as being that which they were in fact, namely, land. The circumstance that the land was originally held merely by way of security, and that while so held the investment was personalty, seems to me to make no difference. The possibility that a mortgage will be foreclosed is inherent in an investment of that character; and, this possibility having taken effect, I can see no equity on the part of any cestui que trust under the will to have the personal character of the investment restored to it.

But when the indenture of November 4, 1899, is considered, the case in favour of the investment being regarded as real estate is immensely strengthened. That document is one to which the persons able to control the character of the investment of the trust fund were parties. And by that document the foreclosed hereditaments are expressed to be conveyed to the uses and upon the trusts under and subject to which the lands ought to be held by virtue of the will and codicil of the testator in the same way as if the said premises had thereby been specifically devised. It is difficult to imagine a clearer adoption of the lands in question as an investment of the character of real estate. And if it is objected to this that an intention to alter the character of the investment from personal estate to real estate is not expressed in terms in the document, there is an obvious reply to this objection. For no such expression in terms occurs in the case of the sum of 1000*l.* which was undoubtedly changed in character from personal estate to real estate at that time by means of the surrender of the mortgage term of 1000 years to secure the remaining mortgage debt of 1000*l.* on the Benniworth property.

So far I have dealt with the matter entirely apart from the provisions of s. 9 of the Conveyancing Act, 1911, which is in these terms: [His Lordship read s. 9, and continued:] It is said that sub-s. 5 of this section operates retrospectively on the foreclosed lands in precisely the same way as if the legislation had been passed prior to the year 1898, and that the foreclosed hereditaments, having thus become retrospectively subject to a trust for sale as from the date of foreclosure, are still liable to be sold and to have the proceeds applied like the mortgage debt, that is, as personalty. But to this contention there seem to me to be two answers, either of which by itself is sufficient.

In the first place it seems to me unreasonable to extend the retrospective operation of sub-s. 5 to cases such as the present, where the position of the property does not depend merely on the effect of the foreclosure orders, but there has been an intermediate transaction by which the foreclosed land has been definitely accepted and settled as land. Quite sufficient effect can be given to sub-s. 5 if it is limited to cases where property foreclosed in the past remained at the passing of the Conveyancing Act of 1911 in the condition determined by the foreclosure. And it is obviously undesirable to extend a retrospective provision of this kind so as to affect past transactions and rights thereby acquired more than is necessary. It must be remembered that the transaction was more than twelve years prior to the passing of the Act.

And in the next place even if, by virtue of sub-s. 5, s. 9 is to be deemed to have applied to these foreclosed lands as from the date of foreclosure, it seems to me that the terms both of sub-s. 3 and of sub-s. 4 have been complied with sufficiently to prevent the reconversion of the land into money under sub-ss. 1 and 2. It is of course true that the terms of the indenture of November 4, 1899, did not—as indeed they could not—point at or precisely comply prophetically with the provisions of either sub-s. 3 or sub-s. 4. But I think that a transaction was effected by that indenture substantially equivalent to the transaction alluded to either in sub-s. 3 or in sub-s. 4, and that on this ground also it should be held that no change in the legal character of the foreclosed land has been effected by s. 9.

I propose, therefore, to declare in answer to questions 1 and 2 of the summons that in the events that have happened the beneficial interest in the entirety of the foreclosed hereditaments passed on the death of John Stuart Bogg to the uses declared in those events by the will of the testator Edward Bogg, namely, to the use of Edward Beverley Bogg, deceased, in tail general. Then in answer to question 3 I declare that the foreclosed hereditaments immediately before the disentailing assurance of October 7, 1916, were legally vested in the defendant Constance Beverley

Paice in tail as the heir in tail of the said Edward Beverley Bogg.

Solicitors: *Edward Downes; Stooke-Vaughan, Taylor & White, for Godson & Piper, Sleaford; Ullithorne, Currey & Co., for Toulmin, Ward & Co., Liverpool.*

F. E.

In re CHARTERIS.

CHARTERIS *v.* KENYON.

[1916 C. 2883.]

SARGANT J.
1917
March 27.

Settled Land—Capital Moneys—Improvements—Irish Estates—Principal Mansion-house—Appointment of Trustees for Purposes of Settled Land Acts—Jurisdiction of High Court in England—Discretion—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *ss.* 25, 26, 38, 65—*Settled Land Act,* 1890 (53 *&* 54 *Vict. c.* 69), *s.* 13—*Trustee Act,* 1893 (56 *&* 57 *Vict. c.* 53), *ss.* 25, 41, 47, 52—*Trustee Act,* 1893, *Amendment Act,* 1894 (57 *Vict. c.* 10), *s.* 2.

Whether the High Court of Justice in England has or has not jurisdiction, under the Settled Land Acts, to deal with applications to appoint trustees of settlements of land in Ireland, and to sanction improvements in Irish landed properties, it recognizes that the proper Court to deal with these matters is His Majesty's High Court of Justice in Ireland, and not the English Court.

In this case an originating summons was taken out, which was intituled "In the matter of the will and codicils of Lady Margaret Charteris, and In the matter of the estates in Ireland, settled by a settlement made in 1887 between R. B. Charteris, the testatrix, and Viscount de Vesci, deceased, and Lord Kenyon" (the last two being the trustees of the settlement), and "In the matter of the Settled Land Acts, 1882 to 1890, and In the matter of the Trustee Acts, 1893 and 1894."

The plaintiff was R. B. Charteris, who was tenant for life in possession of the lands subject to the settlement, and of other lands in Ireland settled by the will of the testatrix, and the defendants were Lord Kenyon (sole trustee for the purposes of the Settled Land

Acts, 1882 to 1890, of the settlement), E. B. Charteris (tenant for life in remainder under the settlement, and of the Irish estates settled by the will, on the death of the plaintiff and default of his issue male) and his two sisters (the tenants in tail in remainder of the same properties on the death of the survivor of the plaintiff and E. B. Charteris, and in default of either of them having male issue), and the trustees of the will. The plaintiff claimed (1.) a declaration that Lord Kenyon, as sole trustee for the purposes of the Settled Land Acts of the settlement, was the trustee for the purposes aforesaid of the Irish estates given and settled by the will and of the bonuses in respect of Irish estates of which Lady Margaret was tenant for life or owner in fee, or the sums in lieu thereof (respectively bequeathed in settlement by her will), and of the freehold lands to be purchased therewith; (2.) alternatively, a declaration that the trustees of the will were, on the true construction thereof, trustees for the purposes of the Settled Land Acts of the premises mentioned in claim (1.); (3.) in the event of the declaration in claim (1.) being made, or, as the case might be, in the event of the declaration in claim (2.) being made, and in the event of the trustees of the will being willing to retire from the trusteeship for the purposes aforesaid of the premises mentioned in claim (1.), an order appointing Lord Kenyon and another named person, or some other fit and proper persons or person, to be trustees of such premises for the purposes aforesaid, with all necessary or proper consequential vesting orders; (4.) an order approving a scheme, submitted by the plaintiff to Lord Kenyon, for the application of capital moneys (and investments of the same) arising under the settlement and in respect of the premises specified in claim (1.), including a sum which represented the bonuses in that claim referred to, in or towards the expenses of rebuilding the principal mansion-house, Cahir Lodge, on the Irish estates, and doing other works, but so that the sum allowed for the rebuilding out of capital money should not exceed one-half of the annual rental mentioned in s. 13 of the Settled Land Act, 1890; and (5.) an order for repayment of certain money spent by the plaintiff on the improvements before submission of his scheme.

All the defendants resided in England, and the capital moneys sought to be dealt with were also in England.

Romer, K.C., and *F. E. Farrer*, for the plaintiff. All the parties to the application, including the trustees of the will and the persons beneficially interested under it, being in England, as also is the capital money referred to in the summons, and that money being directed to be laid out in the purchase of land generally and not necessarily in Ireland, and the Irish land subject to the will being of small extent and value, the Court in its discretion should make the order. It is submitted that there is jurisdiction in the High Court in England to make the order asked for. The power to appoint new trustees is given to " the Court " by s. 38 of the Settled Land Act, 1882, and by s. 65, in the application of the Act to Ireland, " the Court shall be Her Majesty's High Court of Justice in Ireland " ; but by s. 2, sub-s. 10 (ix.), " Her Majesty's High Court of Justice is referred to as the Court " in the Act. The " persons who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement " : Settled Land Act, 1882, s. 2, sub-s. 8. They are not trustees of the land : *In re Earl of Arran and Knowlesden and Creer's Contract* (1) ; Settled Land Act Rules, 1882, Appendix, Form XIX. By s. 25 of the Trustee Act, 1893, a general power to appoint new trustees is given to the High Court ; and by s. 47, sub-s. 1, " all the powers and provisions contained in this Act with reference to the appointment of new trustees . . . . are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890." Sect. 52 only excludes Scotland from the Act of 1893, which clearly applies to Ireland. Indeed, s. 41 says that " the powers of the High Court in England to make vesting orders under this Act shall extend to all land and personal estate in Her Majesty's dominions, except Scotland." Under ss. 54 and 55 of the Trustee Act, 1850, the Court of Chancery in England had power to appoint new trustees, and make vesting orders, of lands in Ireland : *In re Hewitt's Estate* (2) ; *In re Taitt's Trusts* (3) ; *In re Smyth.* (4) Sect. 54 of the Act of 1850 is practically re-enacted by ss. 25 and 41 of the Act of 1893, and s. 55 of the Act of 1850, which gave the powers of the English Court of Chancery to the Irish Court of Chancery, is practically re-enacted by s. 2 of the Trustee Act, 1893,

(1) [1912] 2 Ch. 141, 152.
(2) (1858) 6 W. R. 537.
(3) [1870] W. N. 257.
(4) (1886) 34 W. R. 493.

Amendment Act, 1894. As regards the improvements, the words "the Court" must have the same meaning in ss. 26 and 38 of the Settled Land Act, 1882. In *In re Earl of Dunraven's Settled Estates* (1) English and Irish estates were settled by one settlement, and Kekewich J. sanctioned application of capital money in improvement of the mansion-house on Irish estates, although the point now raised was not taken in that case. In *In re Coote* (2) this Court sanctioned an application of Irish capital to English land improvement. In *In re Gurney's Marriage Settlement* (3) this Court sanctioned improvements of settled land in Scotland. If this Court has not, or refuses to exercise, jurisdiction to appoint, two applications to the two Courts will always be necessary where both English and Irish land are settled by the same settlement. The Legislature could not have intended to impose this burden, for in 1882 most large English landowners held Irish land also.

A. Grant, K.C., *Dighton Pollock*, and *H. M. Broughton*, for the defendants, were not called on.

SARGANT J. I am not going to deal at all with the question as to jurisdiction; I shall leave that point entirely undetermined. For I think that, as a question of discretion, this matter ought to be dealt with by the Irish Courts. The application not only relates to land and Irish estates settled by a will, and asks for the appointment of trustees for the purposes of the Settled Land Acts in respect of those estates, but it also asks that a very large sum of money shall be expended in the improvement of the mansion-house on a large estate in Ireland settled by a settlement made in the year 1887.

Prima facie, as was recognized by Warrington J. in *In re Earl of Arran and Knowlesden and Creer's Contract* (4), the Court to deal with these matters is, under s. 65 of the Settled Land Act, 1882, His Majesty's High Court of Justice in Ireland. I think I should be rather infringing on the mutual courtesy which exists between the Courts here and the Courts in Ireland if I were to deal with the questions raised in the present case. Therefore all I propose to do is to direct that the costs of all parties of this application, as

(1) [1907] 2 Ch. 417.
(2) [1899] W. N. 222.
(3) [1907] 2 Ch. 496.
(4) [1912] 2 Ch. 141, 151.

between solicitor and client, be paid out of the capital money referred to in the summons. It seems to me that the greater part of the costs will not be wasted, as no doubt the Courts in Ireland will allow the evidence taken here to be read there. Perhaps it will be more convenient if I say, in dismissing the application, that the Court, being of opinion that the matters will be more conveniently dealt with by the Irish Courts, makes no order on the application except that the costs referred to shall be paid out of the capital money; and gives liberty to apply in case the Irish Courts decline to deal with the matters.

Solicitors: *Farrer & Co.; Hallowes & Carter.*

F. E.

McLAREN *v.* THOMSON.

[1917 M. 479.]

C. A.
1917
June 22.

Company—Meeting—Voting by Proxy—Proxies to be lodged two Days before Meeting—Adjourned Meeting—Proxies lodged after Date of original Meeting but before adjourned Meeting—Invalidity.

Where the articles of a company provide that "The instrument appointing a proxy shall be deposited at the registered office of the company not less than two clear days before the day for holding the meeting at which the person named in such instrument proposes to vote," proxies lodged after the date of an original meeting, but more than two days before the day fixed for an adjournment thereof, cannot be used for the purpose of voting at the adjourned meeting.

Scadding v. *Lorant* (1851) 3 H. L. C. 418 applied.

Decision of Astbury J. (ante, p. 41) affirmed.

APPEAL from a decision of Astbury J. (1)

The question in this case was whether certain instruments of proxy which had been given and lodged with the City of Chicago Brewing and Malting Company, Limited, at a later date than that originally fixed for the general meeting of the company, and at which that meeting was commenced, but before the date to which the meeting was adjourned, were duly lodged within the meaning of the company's articles so as to entitle the persons named in the instruments

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(1) Ante, p. 41.

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of proxy to vote at the adjourned meeting. Astbury J. held that the proxies were invalid. From this decision the plaintiffs appealed.

The facts and the arguments of counsel sufficiently appear from the report of the hearing in the Court below.

Clauson, K.C., *Stuart Bevan*, and *Barrett-Lennard*, for the appellants.

Hon. Frank Russell, K.C., and *H. E. Wright*, for the respondents.

During the hearing of the appeal the point was raised that the proxies in question were invalid as contravening the provisions of s. 80 of the Stamp Act, 1891, but as this point was not dealt with by the Court the arguments upon it are not reported.

Swinfen Eady L.J. This is an appeal from an interlocutory order made by Astbury J. upon the plaintiffs' motion for an injunction. The plaintiffs are three gentlemen who claim to be the duly appointed directors of the defendant company, the City of Chicago Brewing and Malting Company, Limited, and they ask to restrain the company and its directors from excluding them from acting as directors, and they also ask to restrain the defendant James Dixon Pennington from acting as a director upon the ground that he is not a duly elected director of the company.

The point at issue between the parties turns upon whether certain proxies that were given and lodged with the company at a later date than the date originally fixed for the general meeting, and at which the general meeting began to be held, but before the date to which the meeting was adjourned, were duly lodged within the meaning of the company's articles. It appears that the ordinary general meeting of the company was fixed for December 30, 1916. The notice was sent out convening that meeting, but at the date at which the notice was sent out the audited accounts had not arrived from America, and so, although the notice was duly sent out and the annual general meeting of the company duly convened for December 30, 1916, a footnote was put to the notice convening the meeting stating " The audited accounts have been posted but are unfortunately delayed in transit and have not yet been received. Therefore under these circumstances the directors much regret it will be necessary to formally adjourn the meeting to an early date in January, due notice of which will be sent to the shareholders when the directors' report and statement of accounts will be submitted." Accordingly the meeting was held on December 30, 1916, and at that date it was resolved "That this meeting be adjourned unto the month of January, 1917, to a date to be fixed by the directors, the usual notice to be given to the shareholders." What happened was that on January 11, 1917, a notice was sent out to the shareholders that the meeting (adjourned) would be held—that is to say, the meeting was to be treated as being adjourned to January 24, 1917. That was the date at which the adjourned meeting was held, and that was the date at which the proxies in question were tendered for use and when it is said that the proxies were not available. It is not disputed that there is no general common law right to vote by proxy. A shareholder in a limited company can only vote by proxy if and so far as the articles of the company provide for his doing so. The question in contest between the parties is whether upon the facts of this case the plaintiffs have shown that the proxies by virtue of which they claim to have been elected were valid and in order, and such that the votes for their election could properly be given and counted under those proxies. The question turns upon this: Article 72 of the company's articles of association provides that "The instrument appointing a proxy shall be deposited at the registered office of the company not less than two clear days before the day for holding the meeting at which the person named in such instrument proposes to vote." The question is whether proxies intended for use at a meeting must be deposited two clear days before the day for holding the meeting in the sense of the original date for holding the meeting, or whether, in the event of the meeting being adjourned, it will be sufficient if proxies not deposited in time for the original meeting are deposited two clear days before the day fixed for the adjournment of the meeting. It will be observed that the article in question is not in the form which is now quite common, and, as given in the late Sir Francis Palmer's book, Part I., p. 706 of the 11th edition, provides: "The instrument appointing a proxy shall be deposited at the office not less than forty-eight hours before the time for holding the meeting or adjourned meeting as the case may be." When the article is in that form it is sufficient if the

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proxy be deposited forty-eight hours before the time for holding the adjourned meeting, because the article expressly so provides. The article in the present case provides that it is to be deposited "Not less than two clear days before the day for holding the meeting at which the person named in such instrument proposes to vote." The articles provide for the business that is to be transacted at the general meeting and in respect of which notice is given. Article 53 provides: "The notice convening an ordinary general meeting shall state the general nature of any business intended to be transacted thereat, other than declaring dividends, electing directors and auditors and voting their remuneration and considering the accounts presented by the board and the reports of the board and the auditors. The notice convening an extraordinary general meeting shall state the general nature of the business intended to be transacted thereat." For a general meeting a quorum is necessary, but at the adjourned meeting the members present and entitled to vote, whatever their number or the amount of their shares, have power to decide on all matters which could properly have been disposed of at the meeting from which the adjournment took place; in other words, the provisions with regard to the quorum that it is necessary to have for a general meeting do not apply in the case of an adjourned meeting, the members present then constituting a quorum for that purpose. Then, at an adjourned meeting, by article 56 the members "Shall have power to decide upon all matters which could properly have been disposed of at the meeting from which the adjournment took place." In other words, they are entitled to dispose of all the business left undisposed of at the original date for holding the general meeting. It is conceded that for the purpose of considering what business can be transacted at an adjourned meeting the adjourned meeting is to be considered as the original meeting. It is contended that, although that is so for the purpose of determining or of limiting the business to be transacted (and it is said *Scadding* v. *Lorant* (1) establishes that), nevertheless, for the purpose of article 72, it is sufficient if the proxies are deposited not less than two clear days before the day for holding the adjourned meeting, which for this purpose is to be considered as if it were a separate meeting. In my opinion that contention cannot prevail. There is quite sufficient

(1) 3 H. L. C 418.

in these articles to show that the proxies are intended to be deposited before the date for holding the meeting in the sense of the original date for holding the meeting, summoned for a particular date of which notice has been given. Again, article 79 provides that "No person other than a retiring director shall be elected a director (except as a first director or a director appointed by the board) unless at least four and not more than seven clear days' notice shall have been left at the registered office of the company of the intention to propose him together with a notice in writing by himself of his willingness to be elected." There was in this case a proper notice given of the intention to elect other directors, that is the plaintiffs, and that notice was given at least four and not more than seven days before the original meeting, but it was given more than seven clear days before the adjourned meeting; therefore, if the date of the adjourned meeting is to be taken into consideration in connection with the articles, the notice for the election of the plaintiffs would be invalid. In my opinion the notice is good; and under articles 72 and 79 the date to which regard has to be had is the day for which the meeting is originally summoned. Although other articles may provide, and commonly now do provide, for proxies being available for an adjourned meeting, yet with articles framed such as these the proxies intended for use at an adjourned meeting must be deposited in time for use at the original meeting; and it is not sufficient to deposit them after the date of the original meeting although it may be two clear days before the date of the adjourned meeting. In my opinion the view taken by Astbury J. is right.

My brother Bankes, who has had to leave, desires me to say that he concurs in this judgment.

Warrington L.J. I am of the same opinion and have very few words to add.

The appeal raises a question upon the construction of the articles of association of this company, and in particular article 72. The question, stated concisely, is this: Where the annual general meeting of the company called for one day has been adjourned to another day, is that second day the day for holding the meeting at which the persons named in the instrument of proxy

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propose to vote within the meaning of article 72? It is perfectly plain that under these articles for a very large number of purposes a meeting which has been interrupted by an adjournment, or by more than one adjournment, is nevertheless to be treated as a single and continuous meeting—one meeting. It is suggested that in article 72 there is sufficient context to show that for the purpose of that article the adjourned meeting should be treated not as a continuation of the original meeting, which it would be in the ordinary case, but as a separate and independent meeting. I can find nothing whatever in that article to lead one to any such conclusion. When you come to look at this case and see really what was the meeting at which the shareholders dealing with the proxies proposed to vote, I think it is quite plain they proposed to vote at the meeting which alone, under the circumstances of this case, was competent to do the business on which they did propose to vote—that is to say, the election of directors. That meeting was the annual general meeting for the year 1916 convened for December 30. It seems to me, therefore, the appeal fails, on the ground that, according to the true construction of the articles, the proxies were not deposited within the time limited by article 72.

With regard to the question upon the Stamp Act, it is no doubt an important and difficult question. I do not think it would be right on the present appeal to express any opinion about it.

Appeal dismissed.

Solicitor for appellants: *Charles Thomas Wilkinson.*
Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

G. A. S.

In re CRISPIN & CO.'S TRADE MARK.

EVE J.
1917
June 7, 13.

[1917 C. 780.]

Trade Mark—Registration—Geographical Limitation—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 14, *sub*-s. 4.

Except as provided by s. 21, there is no jurisdiction under the Trade Marks Act, 1905, to impose as a condition of registration that a mark shall only be used in a particular country.

The decision of the Court of Appeal on this point in *In re Dewhurst & Sons' Trade Mark* [1896] 2 Ch. 137, under the Trade Marks Act, 1883, as amended by the Trade Marks Act, 1888, is equally applicable to a case under the Trade Marks Act, 1905.

Appeal by the applicants under s. 14 of the Trade Marks Act, 1905, against an order of the registrar imposing upon the applicants as a condition of registration that the mark should be used only in Russia.

The mark in question consisted of the representation of three bars of iron laid across one another in a triangular shape, enclosing the English word " Bravo " in Roman characters and its equivalent in Russian letters, and the applicants applied to register it for use in connection with metals in class 5, and with cutlery and edge tools in class 12. It appeared from the evidence that the foreign trade of the applicants in the goods comprised in these two classes was a very important one, particularly in Russia, and the registrar, having arrived at the conclusion that the triangle was common to the trade, required the applicants to disclaim any right to the exclusive use of a triangular border, and also imposed the further condition that they should limit the use of the mark to Russia. It was against this last part of his order that the present appeal was brought.

The application for registration was opposed before the registrar by the respondents, J. J. Saville & Co., but they had not given any cross-notice of appeal from the decision of the registrar.

R. Moritz, for the appellants. The registrar had no power to impose this condition. The power, if any, is only conferred by s. 14, sub-s. 4, of the Trade Marks Act, 1905, which provides that in case of opposition the registrar "shall after hearing the parties, if so required, and considering the evidence, decide whether, and subject to what conditions, registration shall be permitted." That provision is substantially the same as the provision contained in s. 62, sub-s. 4, of the Trade Marks Act, 1883, under which the Court of Appeal decided in *In re Dewhurst & Sons' Trade Mark* (1) that the Court ought not to impose such a condition, the reason being that it was not contemplated by the Act and was incapable of being enforced. That reasoning is just as applicable to the Trade Marks Act, 1905, as to the Act of 1883. There is one exception made by s. 21 of the Act of 1905, namely, that in case of honest concurrent user the Court may permit the registration of the same trade mark, or of nearly identical trade marks, subject to such conditions as to "mode or place of user" as it thinks fit, but that provision relating to the special case would have been unnecessary if the power already existed under the previous sections. I also contend that assuming that the registrar had jurisdiction to impose such a condition he was wrong in exercising it in the present case.

J. Whitehead, for the respondents. The registrar had power to impose this condition under the Trade Marks Act, 1905, and was on the evidence right in so doing. By s. 12, sub-s. 2, of the Act of 1905, on application for registration the registrar may refuse or accept it "absolutely or subject to conditions, amendments or modifications," and by s. 14, sub-s. 4 (which is applicable to the present case), may decide "subject to what conditions registration is to be permitted"; and by s. 4 provision is made for keeping at the Patent Office a book called the Register of Trade Marks, containing entries, amongst other things, of conditions and limitations affecting the use of the mark. In the corresponding s. 78 of the Trade Marks Act, 1883, there was no provision for the entry of such conditions and limitations, and this circumstance was taken into consideration by the Court of Appeal in arriving at its decision in *In re Dewhurst & Sons' Trade Mark.* (1) The power conferred on the registrar to impose conditions is quite general, and is not to be restricted because s. 21 in the particular cases there provided for refers to "mode or place of user." If the Court should be against me on the point of law, I ask for liberty to raise the question whether the mark ought to remain on the register without any qualification at all, as this point has never been considered by the registrar.

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(1) [1896] 2 Ch. 137.

Austen-Cartmell, for the registrar, supported the same argument. The present point has not come before the Court under the Trade Marks Act, 1905, but the practice has grown up in the office of imposing geographical limitations as a condition of registration, and I am instructed to say that in this case registration of the mark without such a limitation would have been refused. The Trade Marks Act, 1905, made great innovations in the law, as for instance in s. 21 as to concurrent user, and in ss. 22 and 23 as to assignment and apportionment of marks. These sections clearly assume the possibility of a local grant, and there is no sufficient ground for restricting the conditions referred to in ss. 12 and 14 to conditions other than territorial limitations. Such a limitation might also be imposed by way of disclaimer under s. 15. [He also referred to Kerly on Trade Marks, 4th ed. pp. 255, 256.]

Cur. adv. vult.

June 13. EVE J. delivered the following written judgment:—This appeal raises the question whether there is jurisdiction under the Trade Marks Act, 1905, to impose upon an applicant as a term upon which his trade mark is allowed to be registered a condition that it shall be used only in a particular country. [His Lordship stated the facts as above set out and continued :]

In my opinion the power to impose this geographical limit is to be found, if at all, in s. 14, sub-s. 4, of the Act. I do not think s. 15 is relevant on this point, though it may indicate a method by which the scope and effect of the geographical limit, if capable of being imposed at all, might be defined ; and s. 21, which was also relied on, has, in my opinion, no application to marks which are not identical, or nearly identical, marks. The question is therefore reduced to the inquiry whether a condition imposing a geographical limit to the use of the mark is within the sub-section to which I have referred.

In the case of *In re Dewhurst & Sons' Trade Mark* (1) the Court of Appeal, considering the very analogous provisions of s. 62, sub-ss. 4 and 5, of the Act of 1883, held that the Legislature had made no provision for granting a trade mark which should be used only in one particular country, and although it is true that this conclusion was assisted by, or possibly in part based upon, an examination of the character of the register which was to be kept under the then subsisting statutes and of the matters which were to be entered therein, and that under the present Act the entries in the register cover a wider area and include conditions and limitations qualifying or affecting the registration, it is impossible to read the forcible language in which each of the Lords Justices expressed his opinion on this question of a geographical limit without appreciating that the point about the register was only a subsidiary one, and that the real ground of the decision was absence of all statutory authority to impose such a condition or limitation. So Kay L.J. puts it in the following passage of his judgment, where he says (1): "I cannot find that this Act of Parliament enables the Court to put upon the register a trade mark with a limitation of that kind. I should expect, if that were the meaning of the Legislature, to find in the Act of Parliament a distinct provision that a trade mark may be registered for one country only. There is nothing of the kind in the Act of Parliament. The only section which in any way can be treated as having that meaning, or giving to the comptroller or the Board of Trade or this Court any power of limiting in that way, is s. 62, which refers to the imposition of conditions; but I do not think that imposing conditions in that section means a limitation of the geographical area within which the trade mark can be used. I think that if that had been the meaning it would have been expressed in more explicit and plain words, and I do not find anything in the Act which authorizes any such construction."

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(1) [1896] 2 Ch. 137.

With this plain and unequivocal statement of the law before them the framers of the Act of 1905 substantially reproduced the provisions of the earlier Act relating to conditions without making any specific reference to geographical limitations except—and I agree with Mr. Moritz that the exception is a significant incident—in the case of identical, or nearly identical, marks registered under

(1) [1896] 2 Ch. 155.

s. 21. From all of which I draw the conclusion that the law under the present Act is the same in these respects as regards all marks other than identical, or nearly identical, marks as it was under the Act of 1883, and that the decision which has been cited is equally applicable to the law as it now exists as it was to the law existing in 1896. Accordingly I allow the appeal, and the respondents must pay the costs of the appellant and of the registrar of the appeal. In ordinary circumstances I should also order the respondents to pay the costs incurred before the registrar; but counsel on his behalf is instructed to say that a practice has grown up of imposing geographical limitations as a condition of registration, and that in this case registration of the mark without such a limitation would have been refused. In these circumstances, and notwithstanding that there is no cross-notice of appeal, and to avoid the delay and expense of sending the matter back to the registrar, I extend the time in which the respondents, J. J. Saville & Co., may appeal from the registrar's decision, which, as matters stand, leaves the mark on the register subject to the disclaimer, to which the appellants have raised no objection, for fourteen days from to-day, and if notice of appeal is given within that extended time I will allow either party to file further evidence, and when the evidence is complete an application can be made to fix a day for the hearing. In this event I will deal with the costs of the hearing before the registrar on the hearing of that appeal, but if no notice of appeal is given within the time I have limited all the respondents must pay those costs in addition to the costs of this appeal.

Solicitors: *Wilson & Son; Peacock & Goddard, for Younge, Wilson & Co., Sheffield; Solicitor to the Board of Trade.*

A. C.

SARGANT J.
1917
March 23;
May 1.

In re STAHLWERK BECKER AKTIENGESELLSCHAFT'S PATENT.

[1916 S. 062.]

War—Patent of Alien Enemy—Petition for Revocation—Patentee's Application to amend Patent by Disclaimer—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *ss.* 21, 22.

Where the respondent to a petition for revocation of a patent is an alien enemy, that is no objection to an application by him under s. 22 of the Patents and Designs Act, 1907, for leave to amend his specification by way of disclaimer, inasmuch as the application is by way of defence to the petition.

Semble, however, that a patentee who is an alien enemy cannot make an initiative application under s. 21 of the Act for leave to amend.

LETTERS PATENT (No. 27,838 of 1912) were granted to the Stahlwerk Becker Company, of Krefeld-Willich, Germany, at the date of this application alien enemies, for an alleged invention of an improved high-speed tool steel. A petition was presented in 1916 by Arthur Balfour & Co., Limited, of Sheffield (a company whose name before the war was Seebohm & Dieckstahl, Limited), for revocation of the patent on the ground of want of novelty (by reason of alleged prior user by Seebohm & Dieckstahl, Limited, and prior common general knowledge), and that the alleged invention was not proper subject-matter for letters patent.

The petition could not be served in the ordinary way on the German patentees, so, by order, service was effected by advertisement, and the patentees appeared. They moved for an order that they might be at liberty to amend the specification by way of disclaimer under s. 22 of the Patents and Designs Act, 1907, in manner shown in red ink in the King's Printer's copy of the specification served with the notice of motion.

Walter, K.C., and *Kerly, K.C.* (*R. Moritz* with them), for the applicants. The application to amend the specification is made by the patentees under s. 22 of the Patents and Designs Act, 1907, which provides that in an action for infringement or " proceedings before a Court for the revocation of a patent the Court may by order allow the patentee to amend his specification by way of disclaimer in such manner, and subject to such terms as to costs, advertisement or otherwise, as the Court may think fit." The patentees have entered an appearance to the petition for revocation, and Darwin & Milner, Limited, the English licensees, have been ordered to be served with, and have entered an appearance to, the petition. The procedure on an application under s. 22 is pointed out by Order LIII.A, r. 23. It is settled law that an alien enemy who is not within the realm by licence of the King cannot sue here, but that he may be sued here: *Porter* v. *Freudenberg; Kreglinger* v. *S. Samuel & Rosenfeld.* (1) And it is equally clear that an alien enemy patentee whose patent is attacked by a petition for revocation is in the position of a defendant, and that he is not an actor in the proceedings: *In re Merten's Patents.* (2) The patentee then has the same rights as to defending his property as a British subject has.

[SARGANT J. Can a patentee who is an alien enemy better his position, during the war, by disclaimer?]

If his patent is attacked he can do so.

[SARGANT J. If no proceedings are going on against him, can he apply to amend by substantive proceedings under s. 21 of the 1907 Act?]

It is apprehended that he cannot, as he is then simply an actor. But the proceedings for revocation are in rem and the order is final, so that, if an order for revocation is made, no subsequent amendment can be made, and as soon as the order is lodged the patent ceases to be on the file.

[SARGANT J. The question is whether the patentee is taking an affirmative step or whether what he is doing is a mere defence. He cannot counterclaim in an action, although he may plead a set-off.]

If an alien enemy is "brought at the suit of a party before a Court of justice he must have the right of submitting his answer to the Court. To deny him that right would be to deny him justice and would be quite contrary to the basic principles guiding the

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(1) [1915] 1 K. B. 857.

(2) [1915] 1 K. B. 857, 891.

King's Courts in the administration of justice": *In re Merten's Patents.* (1)

[SARGANT J. Does not the patentee get a right against the other members of the public by virtue of these proceedings ?]

No. The patent is still alive, and the patentee is seeking to diminish and not to increase the rights granted to him. The Court can invite the attendance of some one representing the Crown in proceedings of this kind.

[SARGANT J. Could not an alien enemy seeking to amend his patent get a friendly person to petition for revocation ?]

It is not suggested that these proceedings are collusive. If they were the Court is strong enough to prevent harm following. The patentees have a patent on which they cannot sue during the war, and they cannot sue during the war even if it is amended.

[SARGANT J. But would they not be in a better position by being able to sue after the war for infringements after the amendment ?]

That can be prevented by imposing terms on the patentee. All that the patentees are doing, after being attacked, is to prevent their patent being destroyed. It is not the policy of this country to confiscate the property of alien enemies : *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie.* (2) The patent is not bad if it can be amended by disclaimer; it is only subject to a disease which can be cured : *Reg.* v. *Mill.* (3) [They also referred to *In re Geipel's Patent* (4), *Halsey* v. *Lowenfeld* (5), and *Robson* v. *Premier Oil and Pipe Line Co.* (6)]

Courtney Terrell, for the licensees under the patent, adopted the same argument.

Colefax, K.C., and *James Whitehead* (for *W. Trevor Watson*, serving with His Majesty's Forces), for the petitioners. The section under which this application is made only allows amendment by disclaimer, and what is sought here is not disclaimer at all, but protection for a new invention. As regards the other point, there are three parties to be considered, the Crown, the patentees, and the public, and the application affects persons entirely outside the proceedings. The petitioners are members of the public taking on themselves the onerous task of seeking to revoke this patent, but other persons are affected by its existence. The terms suggested include an undertaking by the patentees; but how can an alien enemy's undertaking be enforced?

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(1) [1915] 1 K. B. 857, 883.

(2) [1917] 1 K. B. 842.

(3) (1850) 10 C. B. 379, 394.

(4) [1904] 1 Ch. 239.

(5) [1916] 2 K. B. 707.

(6) [1915] 2 Ch. 124.

[SARGANT J. The Court could require the undertaking, on behalf of the patentees, to be given by some one in this country.]

The patentees are getting a distinct advantage by being allowed to amend their patent. They ought to have it in valid form when they take their grant from the Crown.

SARGANT J. ordered the application to stand over, and postponed the hearing of the petition, to afford an opportunity for the Crown being heard by the Law Officers or some other counsel on its behalf.

May 1. *Sir F. E. Smith, A.-G.* (*Austen-Cartmell* with him), expressed the opinion that the application for leave to disclaim ought to be allowed to proceed, as it was really a defence to the petition for revocation, and not an initiative proceeding by an alien enemy.

[The same counsel appeared for the parties to the proceedings.]

SARGANT J. This is a motion by a German company, the owners of a patent, who are respondents to a petition for revocation of their patent, that they may be at liberty, under s. 22 of the Patents and Designs Act, 1907, to amend their specification by way of disclaimer. I am dealing now merely with the preliminary point, whether an alien enemy is entitled to avail himself of the provisions of s. 22. The point appeared to me to be an extremely important one, and I thought it desirable that the application should stand over in order that I might have the assistance of the Attorney-General. I am glad that I did so, because in the result, although with very great hesitation, I have come to a different conclusion from the one which I was disposed to entertain when the matter was originally before me.

The question really is this: Is what the German company are proposing to do something which is substantially by way of defence to the proceedings against them, or is it something which is by way of initiative and not merely by way of defence? Let me illustrate it in this way. It is well settled that an alien enemy may, in any proceeding against him, set up a set-off by way of diminution of the claim of the plaintiff, that set-off being, of course, a defence which could not result in an actual order for the payment to the defendant of any sum at all. On the other hand, an alien enemy cannot counter-claim, because, although the counter-claim is dealt with, by virtue of the Rules of Court, in the same proceedings as the claim, it is in its nature an affirmative and not a defensive proceeding, and may result in a larger sum being payable to the defendant—that is, the plaintiff on the counter-claim—than would be payable by him to the plaintiff in the action.

Now is this application for liberty to disclaim a merely defensive application, or is it, to any considerable extent, an affirmative application? For the purpose of answering that question I have to look at ss. 21 and 22 of the Act of 1907. Under s. 21 there is an initial right, quite apart from any pending litigation, given to a patentee of applying for leave to amend his specification, either by way of disclaimer, or by way of correction, or by way of explanation; and it is conceded by Mr. Walter, who appears for the German patentees, that an alien enemy could not initially, and without there being any pending proceedings, apply under s. 21 for leave to amend his specification. That would be an affirmative step which would not be available to him. On the other hand, when s. 22 is looked at, it is obvious that the ambit of the section is very much more limited than that of s. 21. There is no right under s. 22 to correct or explain, and the sole right given by it is a right to apply for leave to disclaim.

The limited nature of disclainer has been pointed out by Lord Westbury in the well-known case of *Ralston* v. *Smith* (1), where, referring to the old legislation as to disclaimer, in remarks which seem to be applicable now, he says: "The object of the Act authorising disclaimers was plainly this, that when you have in your specification a sufficient and good description of a useful invention, but that description is imperilled or hazarded by something being annexed to it which is capable of being severed, leaving the original description, in its integrity, good and sufficient, without the neces-

(1) (1865) 11 H. L. C. 223, 243.

sity of addition, then you might by the operation of a disclaimer lop off the vicious matter, and leave the original invention as described in the specification untainted and uninjured by that vicious excess."

There is also added to s. 22 a proviso which is specially aimed at any amendment being allowed which would have the effect of making the invention substantially larger than, or substantially different from, the original invention. It is also to be noted that the wording of the section is such that the right of disclaimer is given in an action for infringement of a patent or in proceedings before the Court for revocation of a patent. So that, on the face of the section, it appears to be a right which is given in litigation, and given in the second case—that is, in proceedings for revocation—by way of defence. I need not deal with the first branch of the section, because it is clear that an alien enemy cannot himself initiate any proceedings for the infringement of a patent; but, as regards the second branch of the section, the way in which it is framed appears to point to this, that it gives a defence to the respondent in the particular proceedings which are brought against him for revocation.

What had oppressed me a good deal was this, that the result of allowing a disclaimer would be to permit the disclaiming patentee to improve his position, not only as regards the person who was bringing the proceedings for revocation against him, but as against all the world, and it occurred to me that the result might be that, on a friendly petition, a patentee might obtain an improvement of his patent in a way by which he could not succeed in doing apart from such proceedings. But, on the whole, I think that that danger may be guarded against under the very large powers which are given to the Court as to the terms which may be imposed on those who are asking for leave to disclaim. For instance, it will be quite competent for the Court to impose the terms that the alien enemy who is allowed to disclaim shall be precluded from bringing any action after the termination of the war in respect of any infringement of the patent, as improved by disclaimer, committed during the course of the war, as well as prior to the actual disclaimer.

On the whole, therefore, although with the greatest doubt, I have come to the conclusion that this application, so far as the

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preliminary objection to it is concerned,—namely, that the application is one by an alien enemy—is one which ought to be allowed.

Austen-Cartmell. The Attorney-General wished to say that, if there was any suspicion or suggestion that the procedure was being used collusively, he reserved his right to intervene to see that the Court was not imposed upon.

SARGANT J. Of course, if such an objection were brought before the Court, the Court would deal with it.

Solicitors for applicants and their licensees: *Ward, Perks & Terry.*

Solicitors for petitioners for revocation: *Peacock & Goddard, for Younge, Wilson & Co., Sheffield.*

Solicitor instructing the Attorney-General: *Solicitor to the Board of Trade.*

F. E.

ASTBURY J.
1917
June 21.

In re HICKLIN.
PUBLIC TRUSTEE *v.* HOARE.

[1917 H. 383.]

Revenue—Estate Duty—Incidence—Property not passing to Executor as such—Charge of Duty—Beneficial Interests—Rateability of Charge—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 9, *sub-s.* 1.

Public Trustee—Costs of Distribution—Withdrawal Fee—Incidence—Public Trustee Act, 1906 (6 *Edw.* 7, *c.* 55), *s.* 9, *sub-ss.* 1, 2—*Public Trustee* (*Fees*) *Order,* 1912, *Schedule, Division I., Head A, clause* 2.

The estate duty charged by the Finance Act, 1894, s. 9, sub-s. 1, on property that does not pass to the executor as such—e.g., a trust fund passing, in default of appointment, to the pecuniary and residuary legatees of another will—must be borne rateably by the beneficiaries of that property.

Judgments in *Berry* v. *Gaukroger* [1903] 2 Ch. 116 explained and applied.

The costs and expenses of and incidental to (*a*) the payment of that rateable estate duty, (*b*) the payment of legacy duty on the pecuniary legacies, and (*c*) the final distribution of such a trust

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fund, are ordinary costs of distribution and must be borne by the residuary legatees of that fund.

The withdrawal fee payable to the Public Trustee on a final distribution of such a trust fund is a trust expense incurred in making that final distribution and must be borne by the residuary legatees of the fund.

ORIGINATING SUMMONS.

By his will, dated October 29, 1908, Benjamin Hicklin devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion, and out of the moneys thereby obtained (thereinafter called his residuary trust funds) to pay his debts and funeral and testamentary expenses and certain pecuniary legacies payable at the end of four months of his decease free of duty, and to invest the residue of his residuary trust funds and pay the income to his wife for life; and from and after her decease upon trust to stand possessed thereof for such persons as his wife should by deed or will appoint, and in default of or subject to any such appointment to hold his residuary trust funds (as to 8000*l.* upon trusts which ceased in 1913 and subject as aforesaid) upon trust to pay nine pecuniary legacies to nine pecuniary legatees, and to pay and divide the remainder of his residuary trust funds, including the amount of any lapsed legacies, unto and equally between twelve residuary legatees. These nine pecuniary legacies were not given free of duty.

The testator died on March 16, 1909. His funeral and testamentary expenses (including estate duty on his whole estate) and his debts and the legacies then payable and the duties on those given free of duty were paid and the residue was held by the trustees upon trust for the testator's widow for life.

By her will, dated July 7, 1911, the widow exercised her power of appointment over a portion of the trust funds, leaving a considerable portion to go in default of appointment. Her appointment did not affect the nine legacies.

The widow died on February 1, 1915. Her administrator cum testamento annexo was for simplicity referred to as her executor.

On July 18, 1916, the Public Trustee was appointed sole trustee of the testator's will.

On the widow's death estate duty became payable, and was paid on the residuary trust funds. No question arose as to the incidence of the duty attributable to the appointed fund, but as to the unappointed fund the question arose whether the duty was to be borne rateably by the nine legacies and the ultimate residue or wholly by the ultimate residue.

The same question arose (1.) as to the costs and expenses of and incidental to (*a*) the payment of the said estate duty, (*b*) the payment of the legacy duty on the nine legacies, and (*c*) the distribution of the residuary trust funds; and (2.) as to the withdrawal fee payable to the Public Trustee on the distribution.

On March 1, 1917, the Public Trustee issued this summons to determine the above points.

Colquhoun Dill, for the Public Trustee.

Harman, for a pecuniary legatee. As the widow was competent to dispose of the unappointed fund, estate duty was payable on her death under the Finance Act, 1894, s. 2, sub-s. 1 (*a*). Her executor had to pay it in the first instance under s. 6, sub-s. 2, and was accountable under s. 8, sub-s. 3. But the duty being made a first charge on the fund by s. 9, sub-s. 1, must admittedly be borne by that fund. There is nothing, however, in s. 9, sub-s. 1, to throw it rateably on the beneficial interests, and prima facie therefore the duty must be borne by the fund as a whole. In that case the legacies would be paid intact and the duty would in the result fall on residue.

Berry v. *Gaukroger* (1), in which the duty was thrown on the beneficial interests, is clearly distinguishable. The widow's executors in that case were not accountable, as she had no power of appointment, and the case fell within s. 8, sub-s. 4, which throws the duty rateably on the beneficial interests. It was expressly in virtue of that sub-section that the Court of Appeal decided that the charge under s. 9, sub-s. 1, must in that case be borne rateably. In the present case s. 8, sub-s. 4, is inapplicable, and the decision is not really in point. The fund did not, of course, go to the widow's executor as such: *Porte* v. *Williams* (2); *O'Grady* v. *Wilmot.* (3)

As to the second question. Items (*a*), (*b*), and (*c*) are ordinary costs of administration and fall on residue. The withdrawal fee

(1) [1903] 2 Ch. 116, 132—135.
(2) [1911] 1 Ch. 188.
(3) [1916] 2 A. C. 231, 257.

is in the same position. It is merely retained or paid as an additional trust expense: Public Trustee Act, 1906, s. 9, sub-ss. 1, 2; Public Trustee (Fees) Order, 1912, Schedule, Division I., Head A, clause 2. See *Weekly Notes*, 1912, pt. II. p. 187; *Current Index*, 1912, p. clxix.

W. M. Hunt, for a residuary legatee. The first question is answered by *Berry* v. *Gaukroger*. (1) Although all three judges based their judgments partly, and Vaughan Williams L.J. entirely, on s. 8, sub-s. 4, Romer and Cozens-Hardy L.JJ. also relied on s. 9, sub-s. 1, which they treated as in itself making a rateable charge on the beneficial interests: see Austen-Cartmell on the Finance Acts, 5th ed. p. 157.

As to the second question. Items (*a*) and (*b*) should be borne by the persons who bear the duties. Item (*c*) should be borne rateably between the legacies and the residue: *In re Chisholm*. (2) The withdrawal fee should be borne rateably by the legacies and the residue on the same principle that the income fee on annuities and residuary income is borne rateably: *In re Bentley*. (3)

ASTBURY J. (after stating the facts). The first question is whether the estate duty on the unappointed fund should be borne rateably by the pecuniary legatees and the residue, or wholly by the residue.

On the widow's death estate duty became payable on the unappointed fund, being property of which she was then competent to dispose: see Finance Act, 1894, s. 2, sub-s. 1 (*a*). Her executor became liable to pay the estate duty under s. 6, sub-s. 2, and, under s. 9, sub-s. 1, the rateable part of the whole duty payable on the widow's death in proportion to the value of any property which did not pass to her executor as such—e.g., this unappointed fund—is made a first charge on the property in respect of which the duty is leviable. If the life tenant had had no power of appointment, her executor would not have been accountable for the duty (if any), and the pecuniary and residuary legatees would in an ordinary case have become liable, under s. 8, sub-s. 4, to account for their proportionate parts of the duty. In this particular case, the life tenant being the testator's widow, there would have been no duty.

I do not think that *O'Grady* v. *Wilmot* (4) really throws any light on the question I have to decide. It merely decides that personal property appointed under a general testamentary power does not pass to the executor as such.

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(1) [1903] 2 Ch. 116, 132—135.

(2) [1902] 1 Ch. 457.

(3) [1914] 2 Ch. 456.

(4) [1916] 2 A. C. 231, 257.

If the matter were free from authority, I think there would be much to be said for this proposition that, there being estate duty payable in respect of this unappointed fund, which is made a first charge upon the fund by s. 9, sub-s. 1, that incumbrance ought, having regard to the way in which the testator has given the fund, to be discharged out of the fund as a whole, and that thereafter the pecuniary legacies would be payable intact, leaving the remainder of the fund to be distributed as part of the testator's ultimate residue. It is not necessary for me to consider that further, because, in the view that I take of the decision of the Court of Appeal in *Berry* v. *Gaukroger* (1), I am not at liberty to deal with the matter on that footing.

In *Berry* v. *Gaukroger* (1) the testator, who died before the Act, gave his real and personal property to trustees upon trust for conversion and to pay his debts, funeral and testamentary expenses and legacies, and to invest the residue and out of the income to pay to his widow an annuity of 500*l*. Then he directed that after her death the trustees should hold the trust fund upon trust to pay thereout certain legacies amounting in the aggregate to 9000*l*., and then divide the residue among certain persons named in the will. Except that there was no power of appointment given to his widow, the trusts in that case are similar to those with which I have to deal. The widow died after the Act came into operation. Estate duty became payable on so much of the fund as had been set apart to answer annuities and as represented real estate, and the Court of Appeal held that the pecuniary legatees must bear a proportionate part of the duty, and that the whole did not fall upon the ultimate residue under the testator's will. It is perfectly true that all the members of the Court decided the case in one respect on the language of s. 8, sub-s. 4. The property in that case being property for which the widow's executor was not accountable, every person to whom it passed was made accountable under that section in the way that I have read. Vaughan Williams L.J. decided the case solely on the ground of that personal liability. Romer L.J. took,

(1) [1903] 2 Ch. 116, 132—135.

I think, the same view, but he went further. After stating that the words "any property" in s. 8, sub-s. 4, included the pecuniary legacies in that case, he said (1): "that being so, I think that under s. 9, sub-s. 1, the duty assessable as against these legacies became a first charge on the legacies as against the legatees; and, as above observed, I find nothing in the Act or the will which would justify the Court in freeing the pecuniary legatees from this charge by making the residuary legatees indemnify them from it." The language of that sentence is not free from difficulty, and it has been suggested that all that Romer L.J. meant was that the pecuniary legacies, being property within sub-s. 4 of s. 8, and the legatees being therefore under an obligation to pay the duty, the charge in s. 9 was not a charge which in any way overrode that liability. But I think the language must be read as going further than that. His words are: "I think that under s. 9, sub-s. 1, the duty assessable as against these legacies"—not merely the duty payable by the legatees, but the duty assessable as against the legacies—"became a first charge on the legacies as against the legatees." Cozens-Hardy L.J., after basing his judgment on s. 8, sub-s. 4, said (2): "The only other question is whether there is anything in the language of the will sufficient to exempt the legatees from this liability to contribute"—that is, the liability to contribute under the rule that he had previously dealt with.—"I can find nothing in the use of the word 'legacy' to justify this conclusion. The charge created by the Finance Act under s. 9, sub-s. 1, was, of course, not in contemplation by the testator, who died many years before the Finance Act. It is a fresh burden, and it must be borne rateably according to the beneficial interest of the parties in the fund." I can only read the last sentence as meaning that there is a charge (as there undoubtedly is) created by s. 9, and that in the case before him, where there were pecuniary legacies payable out of this fund, and the balance was divisible, as mentioned, that burden was a burden which fell upon all the interests in the fund and must be borne accordingly.

It has been contended that that decision ought to be regarded as based solely upon the facts of that particular case and upon s. 8, sub-s. 4, which was there operative, and that as s. 8, sub-s. 4,

(1) [1903] 2 Ch. 133.

(2) [1903] 2 Ch. 135.

is not operative in the present case, I ought to hold that this duty is an incumbrance upon this trust fund which has now become divisible, and that it ought to be discharged in relief of the pecuniary legatees upon that fund at the expense of the residue. As I have said, if it were not for the decision and the passages which I have read in *Berry* v. *Gaukroger* (1), I think there would be much reason for coming to that view. But, giving the case and the expressions of Romer and Cozens-Hardy L.JJ. the best attention I can, I do not think it would be respectful for me to come to a conclusion which, as far as I can understand their view, would be contrary to the conclusion at which they arrived.

I therefore hold that the charge created by s. 9, sub-s. 1, is a charge on the legacies and on the residue, and that it must be borne rateably by the several interests accordingly.

The second question is, first, how the costs and expenses of and incidental to (*a*) the payment of the said estate duty which is payable proportionately by the various parties interested, (*b*) the payment of legacy duty on the nine pecuniary legacies, and (*c*) the distribution of the balance of the fund ought to be borne; and, secondly, how the withdrawal fee payable under the Public Trustee Act, 1906, and the Rules and Orders made thereunder ought to be borne.

With regard to the first three items, although the estate duty and the legacy duty are duties payable in respect of the interests given to the pecuniary legatees, I think that, as the whole estate is now being wound up and distributed, they are ordinary costs of distribution, and, as the testator has given pecuniary legacies out of this fund and has directed the ultimate residue only to be held for the residuary legatees, I think they must bear and pay these costs as ordinary costs of distribution, and that no proportion thereof ought to fall on the pecuniary legatees.

I have come to the same conclusion with regard to the withdrawal fee payable to the Public Trustee under the Public Trustee (Fees) Order, 1912, which provides (Schedule, Division I., Head A, clause 2) that, upon the withdrawal of any capital from the trust property, a withdrawal fee, as there mentioned, shall be payable. The Public Trustee Act, 1906, s. 9, sub-s. 1, authorizes fees to be charged, and sub-s. 2 provides that any expenses which might be retained or paid out of the trust property if the Public Trustee were a private trustee shall be so retained or paid, and the fees shall be retained or paid in the like manner as and in addition to such expenses. Here the trustee is distributing, or about to distribute, the total fund. I think the withdrawal fee, just as the other expenses, is an expense which he must incur as such trustee in making this final distribution, and that it must fall upon the residue.

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(1) [1903] 2 Ch. 116.

Solicitors: *Finnis, Downey, Linnell & Chessher, for S. W. Page & Sons, Wolverhampton; Cecil John Mercer.*

G. R. A.

BRUTY *v.* EDMUNDSON.

[1914 B. 1336.]

EVE J.
1917
June 6; *July* 10

Costs—Taxation—Trustee-Solicitor—Charges of undue Influence—Fees—Instructions for Brief—Leading Counsel—Discretion of Taxing Master—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-rr.* 29, 38.

A defendant in an action against whom unfounded charges of misconduct have been made by the plaintiff is not the less entitled to his costs reasonably incurred in rebutting those charges because the plaintiff has abstained from claiming any relief against that defendant, and has professed in the pleadings to sue him only as trustee. In taxing the costs of such a defendant he should be allowed the costs of briefing two counsel.

THESE were two summonses on behalf of the defendants to the action to review a taxing Master's certificate filed April 4, 1917.

The action was brought by the plaintiff, Mr. Bruty, as mortgagee of a reversionary interest of George Ewbank Edmundson to set aside, on the ground of undue influence, so much of a resettlement dated May 20, 1903, made by the Rev. George Edmundson and his son George Ewbank Edmundson as provided for the raising and payment of a sum of 7000*l.* to the father out of the capital of the trust property, and also to set aside on the same and other grounds a purchase by the father from the son in 1907 of the reversionary interest of the latter in what remained of the trust property.

The plaintiff had been induced by the son in 1913 to advance 1000*l.* on the security of his reversionary interest without being informed of the previous sale to his father. Both father and son were trustees of the deed of resettlement, and were sued as beneficiaries and also as trustees. The other two trustees of the resettlement were Alfred A. Edmundson and Charles F. P. Edmundson. They were added as defendants to the action and sued only as trustees. Alfred A. Edmundson had no personal interest in the resettlement and submitted to act as the Court should direct. Charles F. P. Edmundson was a relative of the father and son, and also the family solicitor by whom the proposals for the resettlement had originally been formulated. At the trial Alfred and Charles Edmundson were represented together by leading as well as by junior counsel, and so was the father. The briefs delivered were similar. George Ewbank Edmundson was absent from England and did not appear at the trial. No relief as to costs or otherwise was claimed against Charles Edmundson. The details of the charges of undue influence and the other relevant facts sufficiently appear from the judgment of the Court on the present application.

At the trial Eve J. held, on the evidence, that no undue influence by the father or Charles Edmundson had been exercised, and he dismissed the action, except as against G. Ewbank Edmundson, with costs to be paid by the plaintiff: *Bruty* v. *Edmundson.* (1)

The first summons, by three of the defendants, including Charles F. P. Edmundson, related to the disallowance by the taxing Master of half the fee of 100 guineas for preparing instructions for brief; and the second was by the defendant Alfred Augustus Edmundson and related to the disallowance altogether of fees for leading counsel on behalf of himself and Charles Edmundson and the reduction of the fee for junior counsel.

P. O Lawrence, K.C., and *Dighton Pollock*, for the summonses. The costs were carried in in two bills. The first bill was that of the defendants, the Rev. George Edmundson, Charles F. P. Edmundson, and Thomas Other Burrill, who found the money to buy the reversion. That is the subject of the first summons. The fee of 100 guineas for "instructions for brief" was reduced to 50 guineas,

(1) (1915) 113 L. T. 1197.

but the taxing Master by a note on the bill shows, as we submit, that he improperly considered the fee as partly paid for by items of 15 guineas and 10 guineas which he had previously allowed for instructions for defence and affidavit of documents. It is not a question of pure discretion. The second bill of costs, the subject of the second summons, was made out in the name of Alfred Edmundson alone, though Alfred and Charles were represented by the same counsel at the trial. The fees for leading counsel were wholly disallowed by the Master and the junior's fee reduced. This is really a matter of principle. A trustee who has serious charges of misconduct alleged against him is entitled to the assistance of leading counsel. A great mass of papers had to be considered, going back to 1903. Charles Edmundson was also a solicitor of repute where he lived, and was bound to defend his character and to come properly represented to meet the charges. The Master said that Alfred and Charles Edmundson were sued only as trustees, and were merely nominal defendants and not entitled to the services of a leader. It is not a question purely of the discretion of the taxing Master.

Maugham, K.C., and *A. M. Begg*, for the respondent. The summonses are misconceived. As to the fee of 100 guineas for instructions for brief, it is purely a question of quantum and no principle is involved. It is in the discretion of the taxing Master: Order LXV., r. 27, sub-r. 38. It is the general rule not to allow costs for re-perusing documents: *In the Estate of Ogilvie.* (1) The Master's decision is final.

On the second point, as to fees for leading counsel, our submission is that there never was any charge against Charles and no relief was sought against him, or claim for costs. The action was to re-form the resettlement, and counsel for Charles offered no argument at the trial. Charles could not be treated as an active litigant. He was not acting in defence of the trust, or for the benefit of the estate. He has mistaken his position and has incurred these costs by over-caution: *Walters* v. *Woodbridge* (2); *In re Dunn.* (3)

P. O. Lawrence, K.C., in reply on the main point as to fees for leading counsel. The applicant Charles, as trustee, is justified in

(1) [1910] P. 243.
(2) (1878) 7 Ch. D. 504.
(3) [1904] 1 Ch. 648.

defending his settlement against attack, and the decision of the taxing Master is wholly wrong in principle. Also, as the solicitor who prepared the documents sought to be impeached, and against whom allegations of unfair, injurious, and oppressive conduct are made, he is entitled to defend his character. That is supported by many authorities: *Bridgeman* v. *Green* (1); *Huguenin* v. *Baseley* (2); *Harvey* v. *Mount* (3); *Prideaux* v. *Lonsdale* (4); *Baker* v. *Loader* (5); *Clark* v. *Girdwood.* (6)

Maugham, K.C., in reply on the cases. These cases are now obsolete. The practice has altered: Annual Practice, 1917, p. 530; *Burstall* v. *Beyfus.* (7)

Cur. adv. vult.

July 10. EVE J. The two summonses with which I have to deal are summonses on the part of the defendants other than the defendant George Ewbank Edmundson to refer back to the taxing Master his certificate filed on April 4, 1917, with a view to his allowing certain of the objections lodged by the applicants to his taxation on November 30 last.

The one summons relates to an item of 105*l.* charged in the bill brought in by the defendants George Edmundson, Charles Francis Peter Edmundson, and Thomas Other Burrill for "instructions for brief," of which one half has been disallowed. It is conceded that prima facie this objection relates to a question of quantum, but it is contended that a note of some figures made by the Master on the bill shows that in arriving at his decision to allow 50 guineas only for this work he improperly regarded it as partly paid for by the 15 guineas and 10 guineas which he had previously allowed for "instructions for defence" and for "instructions for affidavit of documents" respectively. I do not think this conclusion necessarily follows from the note on the bill to which attention has been drawn, and, having regard to the fact that the details of the entry under the item "instructions for brief" include the perusal of many documents which must necessarily have been carefully

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(1) (1757) Wilm. 58.
(2) (1807) 14 Ves. 273.
(3) (1845) 8 Beav. 439, 452.
(4) (1863) 4 Giff. 159, 178.
(5) (1873) L. R. 16 Eq. 49, 53, 56.
(6) (1877) 7 Ch. D. 9, 23.
(7) (1884) 26 Ch. D. 35, 40.

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examined for the purposes of the defence and in a lesser degree for the purposes of discovery, the Master was, I think, bound to take into consideration the allowances already made in respect of these two matters when he came to fix the proper fee to be allowed for work which to some extent covered the same ground. I cannot see any sufficient material for holding that the Master has proceeded on a wrong principle, and if no question of principle is involved, his decision on the quantum of such an item is conclusive: *In the Estate of Ogilvie.* (1) Accordingly I dismiss this summons with costs.

The other summons gives rise to greater difficulties. It is a summons by the defendant Alfred Augustus Edmundson, and he seeks to have the decision of the taxing Master reviewed by the inclusion in his bill, as taxed, of items amounting to a total of between 300*l.* and 400*l.* representing costs and payments out of pocket incurred and made in briefing leading counsel at the trial on behalf of himself and his co-trustee, the defendant Charles F. P. Edmundson, whom I shall hereafter refer to as Charles or Charles Edmundson.

The two defendants Alfred and Charles were, and were sued as, two of the trustees of the settlement which the plaintiff in the action sought to have in part set aside or re-formed, the other two trustees being their co-defendants George and George Ewbank Edmundson, who were sued as trustees and in their personal capacities as beneficiaries under the settlement. George Ewbank Edmundson did not appear in the action, and until shortly before briefs were delivered the defendants George Edmundson, Burrill, and Charles were all represented by the firm of Edmundson & Gowland, of Masham, of which firm Charles was a member, and whose London agents were Messrs. Burton, Yeates & Hart. Alfred Edmundson retained as his solicitors Messrs. Barclay & Co., of Macclesfield, for whom again Messrs. Burton, Yeates & Hart acted as London agents. It is not suggested that if this condition of things had been maintained for the trial Mr. Alfred Edmundson, against whom no charge of impropriety was made in the pleadings, and who by his defence submitted to act in all respects as the Court should direct, would have been justified in incurring the expense

(1) [1910] P. 243.

of briefing leading counsel, but it appears that when counsel was advising the other defendants on evidence he expressed the opinion that Charles Edmundson should be represented at the hearing separately from his co-defendants, George and Burrill, and thereupon, in lieu of briefing separate counsel for Charles, an agreement was come to whereby his name was to be added to the brief then about to be delivered on behalf of Alfred. This agreement is recorded in the bill delivered by Barclay & Co. to Alfred under date October 12, 1915, in these terms: "Note.—To save expense it was arranged that Mr. Charles F. P. Edmundson should be included in this brief both in his position as a trustee and in his personal capacity." I do not pause to examine how far the concluding words of that note accurately describe Charles' position in the action, but no alteration was made in the form of the bill, which continued to be made out and was in fact carried in for taxation as Alfred's bill of costs. Similarly, no alteration was made in the bill of the other defendants after October 12, and this bill was carried in for taxation as the bill of costs of George Edmundson, Charles Edmundson, and T. O. Burrill.

On these facts the respondent bases his first answer to this summons. According to his contention the bill which the Master has taxed is the bill of Alfred Edmundson; it is not, he argues, suggested that Alfred would have been justified in briefing leading counsel, and the summons which seeks to review the taxation of his bill by allowing the items for leading counsel must therefore fail. I think in form this contention is right, but in form only. The entries in the bill after October 12 ought to have been charged to Alfred and Charles jointly, and as from that date the bill ought to have been brought in for taxation as the joint bill of the two; but no one disputes or repudiates the arrangement referred to in the note I have read from the bill, and no one in the face of that note suggests that he has been misled by the manner in which this bill and the bill of the other defendants were brought in for taxation. The taxing Master, in the presence and with the tacit consent of all parties, has conducted the taxation on the footing that the agreement was in fact come to, and would, I doubt not, have allowed the titles of the bills to be amended had objection been taken thereto. In these circumstances I cannot allow this application to be disposed of on an objection which goes to form only and does not in any way affect substance.

I turn, therefore, to the consideration of the summons on its merits.

The plaintiff in the action had been induced in July, 1913, by the misrepresentations of the defendant George Ewbank Edmundson, to advance to that defendant a sum of 1000*l.* on the security of a charge on his reversionary and other interests under a resettlement of personalty made by him and his father dated May 20, 1903. A few months later the plaintiff discovered that the reversionary and other interests comprised in his mortgage had been sold to the defendant George Edmundson prior to the date of the mortgage, and in these circumstances his security appeared to be valueless. But after further inquiry he determined to impeach, if he could, so much of the resettlement as secured a pecuniary benefit of 7000*l.* to the defendant George Edmundson, and also the subsequent purchase by the latter of the reversionary and other interests of George Ewbank Edmundson, and with these objects the action of *Bruty* v. *Edmundson* (1) was commenced.

The defendants to the action were George Ewbank Edmundson, the settlor and mortgagor, George Edmundson, his father and the purchaser of his reversionary and other interests, and Charles Edmundson and Alfred Edmundson, who, with the mortgagor and his father, were the trustees of the resettlement. The relief claimed by the writ as originally indorsed was of the nature I have indicated, and at the foot was a memorandum in the following terms: "Each of the defendants George Edmundson and George Ewbank Edmundson is sued in his personal capacity and also as one of the trustees of the said resettlement and the defendants, Charles Francis Peter Edmundson and Alfred Augustus Edmundson, are sued as the other trustees thereof." When the statement of claim came to be delivered it appeared that the plaintiffs' claim was based mainly upon allegations to the effect that the resettlement in 1903 and the purchase in 1907 had been each brought about by the undue influence of the father and of Charles, who, it was alleged, had acted as solicitor in the transactions, and who was undoubtedly a relative in whom George Edmundson and his son reposed implicit confidence. The statement of claim was subsequently amended and reamended; Burrill, who claimed to be a mortgagee of the interests purchased by George, was added as a defendant, and ultimately, when the action was set down for trial, the statement of claim contained allegations against Charles to the following effect: (in paragraph 6) that the resettlement was first proposed by George or Charles, and that the settlor was nominally represented by a separate solicitor introduced for the occasion by Charles; (in paragraph 6A) that Charles had induced the settlor to believe that his father had a moral claim to be recouped out of the settled property the expenses incurred by him in educating the son and preparing him for the Army, and had put pressure on the son to accept a grossly inadequate annual allowance as a fair equivalent for the benefits conferred on the father by representing that without the aid of the said annual sum he would be unable to maintain his position in the Army; (in paragraph 7) that the resettlement was in no way beneficial to the son, but was unfair, injurious, and oppressive to him, and had been executed by him under the influence of his father and Charles without effective independent advice, and without his understanding the true purport and effect thereof, and that the said influence was unduly and improperly exerted for the advantage of the father; and (in paragraphs 14 and 18) that the son was induced to write a letter in October, 1906, offering his reversionary and other interests for sale to his father under the impression produced upon him by his father and Charles that he would eventually benefit to a far greater extent by his said reversionary and other interests being kept in the family than by their being sold in the market.

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(1) 113 L. T. 1197.

These allegations, relating, as they do, to matters constituting part of the undue influence on which the plaintiff intended to rely, were properly pleaded in compliance with r. 6 of Order XIX., but I do not agree with the argument on the part of the plaintiff that they contain no charge of personal misconduct on the part of Charles, or that they can be construed as referring only to acts done by him as solicitor for and on the instructions of his co-defendant George. The plaintiff, in my opinion, did in his pleading allege conduct by Charles amounting to an improper exercise on his part of the influence which his age, his knowledge of business, his relationship, and the confidence reposed in him by the younger man had all combined to give him, and no surprise can be felt that Charles, who fills more than one public office in the locality where he practises, and whose conduct in these matters was, as events turned out, found to be quite irreproachable, was not prepared to go to trial without being so represented at the hearing as to make sure of his character being completely vindicated. It was in these circumstances that leading counsel was briefed for the trustees as well as for the principal defendant George Edmundson.

But in order to appreciate the respondent's contentions on this summons it is necessary to pursue the examination of the pleadings a little further. No relief for costs or otherwise is sought against Charles Edmundson by the statement of claim, and at the foot of it is repeated the memorandum which appears on the writ stating the respective capacities in which the defendants are sued. By his defence Charles states the facts relating to his participation in the two impeached transactions, denies that he put any pressure on George Ewbank Edmundson or made any of the alleged representations to him, or that the resettlement was executed under his influence, or that he did anything to produce the impression which led to the sale and purchase, and concludes with a paragraph in which, after repudiating all knowledge of any circumstance rendering the respective transactions void or voidable, wholly or partially, he avers that "he has no personal interest in upholding the documents or any of them, and submits to furnish to the Court all information and assistance within his power with reference thereto, and to act in all respects in relation thereto as the Court shall direct."

On behalf of the respondent it was argued that in determining whether Charles ought to be allowed the costs of briefing leading counsel the Court should be guided by the principles laid down in cases where the extent of a trustee-defendant's right to be indemnified against costs out of the trust estate has been considered. The argument was put in this way: A trustee-defendant is not always entitled to be indemnified by the trust estate for costs and expenses incurred in defending his own character. If, for the benefit of the trust estate, he defends an action brought against him in respect of the trust estate, he is entitled to indemnity, and not the less because in defending the trust estate he also defends or vindicates his own character; but this is because in such a case his own vindication is merely incidental to his defence for the benefit of the trust estate, and, his right to indemnity being established by this latter element, it is impossible to split the defence and to say that because the trustee at the same time defended his own character he is only to have a part of the costs: *Walters* v. *Woodbridge*. (1) But where, as here, the trustee does not attempt to defend the trust estate, and where, therefore, the element of benefit to the trust estate is absent, the Court does not allow the defence, which is in substance a defence of his own character only, to be conducted at the expense of the estate. Accordingly it was contended by the respondent that Charles, being only a nominal defendant against whom no relief was sought, and having by his pleading disclaimed any intention of defending the trust estate, ought only to be allowed to recover from the plaintiff such costs of the action as he would be allowed out of the trust estate if recourse had to be made to that estate for payment of his costs.

I do not accept this reasoning. In my opinion there is no warrant for gauging the defendant's rights against the plaintiff by reference to the measure of his rights against the trust estate under his contract of indemnity. The liabilities towards the defendant of the plaintiff and the beneficiaries arise out of distinct and wholly different relationships; they have no community of origin, and there is no common standard by which both can be measured or assessed, and if the plaintiff is to succeed in his opposition to this summons it must, in my opinion, be upon grounds which are independent of those on which the beneficiaries could rely were the trust estate being sought to be charged with these costs.

He alleges that there are such grounds, and he relies on the facts that he claimed no relief in the action against Charles; that Charles need not, and indeed would not, have been a necessary party but for the accident that he was one of the trustees of the impeached deed; that Charles, in view of the presence as parties to the action of all the beneficiaries interested in the subject-matter, was not called upon to defend, and in terms repudiated any intention of defending, the trust estate; that, had the other parties chosen

(1) 7 Ch. D. 504.

to come to a compromise, Charles could not have been heard to insist on the action being tried, and that, if none of the other parties had elected to call him as a witness, Charles could not have insisted on going into the box in the absence of any claim being made against him for costs or otherwise.

I think I may assume that these assertions are in the main well founded. It is true that but for his being a trustee Charles would not properly have been made a defendant, and that in this position of affairs, as also in the case either of the action being compromised or of none of the other parties electing to call him as a witness, Charles would or might have had to put up with the hardship of being deprived of the opportunity of denying on oath the truth of the allegations made against him; but in this particular case and at this stage of it all these contingencies are relegated to the region of "the might have been," and I do not quite appreciate why I should regard them as matters of much weight in determining whether, in other circumstances than those to which any of such contingencies would have given rise, Charles is still to suffer some disqualification. He was, in fact, of necessity made a party to the action, no compromise was arrived at, and when he was called as a witness by his co-defendant George Edmundson he had the satisfaction of disproving the allegations made against him.

The question in these circumstances is, Can the plaintiff, who has failed to substantiate allegations of misconduct against a defendant, escape from the liability to pay the costs reasonably incurred by that defendant in relation to those charges of which the truth or falsity had to be determined at the trial by abstaining from claiming any relief against that defendant and by insisting in the pleadings that he is sued only as a trustee?

In many cases I should say obviously not. The allegations may be so reckless or so gross as to negative the suggestion that the plaintiff could make them with impunity; but in this case my difficulty lies in this, that I have on the one hand a plaintiff upon whose conduct no reflection has been or can be made, and who indeed is entitled to some sympathy in the loss he has already sustained, and on the other a defendant whom I have held to have been justified in construing the allegations as allegations of improper conduct on his part as a professional man, and in preparing to vindicate his character at the trial by being represented by two counsel.

I think, however, when once I have arrived at the conclusion that the plaintiff could not, so to speak, limit his liability in the matter of costs by asking no relief from the defendant, I ought to give effect to the conclusion by holding that, having failed to substantiate the allegations, he must bear the consequences.

Accordingly, I propose to refer the matter back to the taxing Master with an intimation that the defendant ought to be allowed the costs of briefing two counsel. I think in arriving at the decision he did the taxing Master was inclined to regard too much the relationship of the defendant to the trust estate, and as a result of the whole discussion I should say that, prima facie, a plaintiff who makes relevant allegations of misconduct against a party to the action, and fails to prove them, must pay the costs incurred by that party in rebutting these allegations, and cannot escape from this liability by making no claim against the party attacked, or by suing him as a trustee. Of course, if the allegations are irrelevant to any issue in the action, the remedy is to get them struck out on that ground. The plaintiff must pay the costs of this summons.

Solicitors: *Burton, Yeates & Hart, for Edmundson & Gowland, Masham; Duffield, Bruty & Co.*

G. M.

Considered. SELLERS v. LONDON COUNTIES NEWSPAPERS [1951] 1 K. B. 784

LEVY *v.* GOLDHILL.

[1916 L. 721.]

PETERSON J.

1917

June 15, 18, 19, 25.

Commission Agent—Contract for Indefinite Period—Determination of Contract—Notice—"Repeat" Orders—Continuance of Commission after Determination of Relationship—Measure of Damages.

The plaintiff in the course of travelling for his own business obtained orders for other traders on terms of commission. The defendant agreed with the plaintiff as follows: "I agree to pay you half profits on receipt of orders (provided the customer is good). Same applies to repeats on any accounts introduced by you." The defendant subsequently terminated the relation constituted by the agreement without giving any notice:—

Held: (1.) That there was no employment of the plaintiff by the defendant in the strict sense, and that the defendant was entitled to terminate their relations without notice.

Joynson v. *Hunt & Son* (1905) 93 L. T. 470 applied.

(2.) That, notwithstanding the termination of the relation, the plaintiff was entitled to commission on orders whenever received if they came from customers introduced by the plaintiff.

Bilbee v. *Hasse & Co.* (1889) 5 Times L. R. 677 (affirmed C. A. *Times* newspaper, Jan. 16, 1890) applied.

Morris v. *Hunt & Co.* (1896) 12 Times L. R. 187, *Barrett* v. *Gilmour & Co.* (1901) 6 Com. Cas. 72, and *Weare* v. *Brimsdown Lead Co.* (1910) 103 L. T. 429 commented upon and distinguished.

The measure of damages discussed.

WITNESS ACTION.

The plaintiff, Louis Levy, carried on various businesses of his own, and as he travelled about the country in connection with them he also obtained orders for other traders on terms of commission. The defendant, Shirley Goldhill, carried on, under the style of Goldhill & Co., the trade of dealer in sponges, brushes, and hardware.

On May 5, 1915, the defendant wrote to the plaintiff the following letter: "L. Levy Esq. Dear Sir,—I agree to pay you half profits on receipt of orders (provided the customer is good)." Then followed a list of prices upon which the profits were to be based, after which the letter proceeded thus: "Same applies to repeats on any accounts introduced by you. Yours truly, Shirley Goldhill."

The plaintiff obtained and transmitted orders to the defendant under that agreement. Disputes subsequently arose between the

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parties, and ultimately on March 7, 1916, the defendant wrote to the plaintiff requiring him to return all the defendant's samples and refusing to have the plaintiff represent him any further.

Thereupon the plaintiff commenced this action for damages for breach of the agreement, an account of the profits made by the defendant on all orders and repeat orders given by customers introduced or procured by the plaintiff and of the commission payable to the plaintiff in respect thereof, and payment of the amount found due.

Among the questions raised at the trial the only two which call for a report were (1.) whether the plaintiff's right to a commission in respect of repeat orders continued after and notwithstanding the termination of the agreement, and (2.) whether the plaintiff was entitled to any and what notice from the defendant determining the agreement.

Hughes, K.C., and *E. G. Rand* (*J. Rutherford* with them), for the plaintiff. We submit that under this agreement the defendant was bound to employ the plaintiff, and that the agreement established the relation of master and servant between them, and that the plaintiff was entitled to reasonable notice, and not having received it is entitled to damages for what in effect was wrongful dismissal.

The commission on repeat orders was not confined to those orders given during the continuation of the relation created by the agreement, but continues after its termination: *Bilbee* v. *Hasse & Co.* (1); *Salomon* v. *Brownfield* (2); *Faulkner* v. *Cooper & Co.* (3); and is even payable after the death of the traveller: *Wilson* v. *Harper.* (4)

Samuel J. Duncan, for the defendant. There was no relation of master and servant between the parties. The plaintiff was a commission agent pure and simple whose employment can be determined at any time without previous notice: *Joynson* v. *Hunt & Son* (5); *Alexander* v. *Davis & Co.* (6); *Henry* v. *Lowson* (7); *Motion* v. *Michaud.* (8)

"Repeat" here is equivalent to "indirect," which was the word

(1) 5 Times L. R. 677; affirmed C. A. *Times* newspaper, Jan. 16, 1890.

(2) (1896) 12 Times L. R. 239.

(3) (1899) 4 Com. Cas. 213.

(4) [1908] 2 Ch. 370.

(5) 93 L. T. 470.

(6) (1885) 2 Times L. R. 142.

(7) (1885) 2 Times L. R. 199.

(8) (1892 8 Times L. R. 253, 447.

used in *Weare* v. *Brimsdown Lead Co.* (1), and as in that case applies only to repeat orders while the plaintiff was travelling for the defendant: *Morris* v. *Hunt & Co.* (2); *Barrett* v. *Gilmour & Co.* (3); *Nayler* v. *Yearsley.* (4) In the cases cited on behalf of the plaintiff the decision turned on the special terms of the agreements.

Hughes, K.C., in reply.

Cur. adv. vult.

June 25. PETERSON J., after stating the facts and referring to the defendant's letter of May 5, 1915, continued: The meaning of that document is this, as I understand it: "You are to be entitled to half the profits ascertained in the manner stated in the document, but of course if there are no profits at all the result will be that you will not be entitled to any commission." I think that involves this, that it must be open to the defendant to accept or refuse any particular order that is presented. The agreement is that half the profits shall be ascertained in the way which is specified in the document and shall be paid on receipt of the orders provided the customer is good—that is to say, provided the customer is recognized to be a person of credit. Then there comes at the end of the document a clause which has raised one of the questions in this case: "The same applies to repeats on any accounts introduced by you." That appears to me to be equivalent to a provision that the plaintiff is to be entitled to one half of the profits derived from any repeat orders given by customers who have been introduced by him. The question is whether that agreement extends to orders by customers introduced by the plaintiff given after the termination of the relation between the plaintiff and the defendant.

Now the agreement is not for a definite period. It is for an indefinite term. There are various cases to which my attention has been directed. The chief of them is one which went to the Court of Appeal—*Bilbee* v. *Hasse & Co.* (5) The plaintiff in that case had a very large connection in London and the home counties, and the defendants gave the plaintiff a letter which contained this provision: "As regards your commission, we hereby agree to allow you 1½ per cent. upon all orders executed by us and paid for by the customers arising from your introduction." There the agreement was also for an indefinite period. There was a quarrel, the relation was determined, and the action was tried by Lopes L.J., who was sitting on this occasion in the Queen's Bench Division as a judge of first instance. Lopes L.J. in giving judgment said: "It was contended by the plaintiff that the true construction of the agreement was that he was to receive commission in respect of all orders executed by the defendants and paid for by their customers arising from his introduction, not only during the time he was in their employment but afterwards. The defendants, on the other hand, said that this agreement only applied to the time he was in their employment, and that as soon as that employment was terminated they were no longer liable to pay commissions, even although the orders arose from the introduction of the plaintiff. He thought the view the plaintiff put upon it was the correct one. He was impressed at first by the view that when the agreement terminated it would be a hardship for the defendants to have to account to the plaintiff. Mr. Finlay had said, however, that no such hardship existed, because they were not obliged to execute those orders which arose from his introduction. That suggestion was weighty and cogent, and in the result he had come to the conclusion that the plaintiff was entitled to commission, provided the order arose from his introduction, although the employment had terminated." That case went to the Court of Appeal (1) and the decision was confirmed. As Bowen L.J. put it: "The measure of his"—that is the plaintiff's—"payment was to be calculated not by the work done by him, but by the fruits of that work, and those fruits might very well accrue to the defendant after the determination of the agency."

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(1) 103 L. T. 429.
(2) 12 Times L. R. 187.
(3) 6 Com. Cas. 72.
(4) (1860) 2 F. & F. 41.
(5) 5 Times L. R. 677, 678.

There is a case that came before Mathew J.—*Salomon* v. *Brownfield*. (2) There the agreement was of a somewhat similar nature; the plaintiff was to travel for the defendants in Australia on terms that he was to get 7½ per cent. upon the net amount of cash in payment of goods, orders for which were obtained through him, also 7½ per cent. upon all orders from customers introduced by him, on payment being made by them, whether such orders were obtained through the plaintiff's representation or not. Mathew J. said: "No period was put to the duration of the contract, the reason being that payment should be made upon all orders received from customers introduced by the plaintiff. It was said the contract was only to last a reasonable time or until it was ended by a reasonable notice. He saw no reason to import that into the contract. It was open to the defendants to cease to deal with the customers introduced." Accordingly he gave judgment for the plaintiff. *Faulkner* v. *Cooper & Co.* (1) was a similar case in which Mathew J. arrived at a like conclusion. In *Wilson* v. *Harper* (2) a similar result was reached, but the agreement in that case was clearer and more definite in its terms.

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(1) *Times* newspaper, Jan. 16, 1890.

(2) 12 Times L. R. 239.

For the defendant three cases were cited. One was *Morris* v. *Hunt & Co.* (3), which came before Collins J. with a common jury. I cannot, however, derive any assistance from it. There was a contract by which the defendants stated that they should be pleased to allow the plaintiff 5 per cent. discount on all orders received from the firms named—that is to say, in a list which the defendants enclosed for the purposes of the plaintiff's work—" and on any fresh ones you can introduce. You will keep a record of your calls and send us particulars from time to time, for which purpose we send you a manifold book." The relations between the parties were severed and litigation ensued. The learned judge, according to the report, held in the first instance that with regard to new customers introduced by the plaintiff the case was governed by the case in the Court of Appeal—that is to say, *Bilbee* v. *Hasse & Co.* (4) At a later stage he appears to have left the following questions to the jury:—" (1.) Was it an implied term of the contract that the plaintiff's right to commission should continue after his dismissal in respect of all orders accepted by the defendants from customers from whom he had obtained orders before his dismissal, (*a*) from persons not named in the original list"—that means all customers introduced by the plaintiff himself—" (*b*) from persons named therein?"—that is to say, from customers whose names were supplied by the defendants. The jury answered the question in the negative, and accordingly judgment was given on that finding in

(1) 4 Com. Cas. 213.
(2) [1908] 2 Ch. 370.
(3) 12 Times L. R. 187.
(4) 5 Times L. R. 677.

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favour of the defendants. The result, therefore, is simply this, that, whether rightly or wrongly, it was left to the jury to determine whether there was in the contract an implied term under which the plaintiff was entitled to commission on orders given after his dismissal by customers previously introduced by him, and the jury took the view that there was not.

Barrett v. *Gilmour & Co.* (1) is, owing to the extreme brevity of the judgment as reported, somewhat difficult to understand. In that case there was the following offer to the plaintiff which was accepted by him: "We hereby offer you our representation in the towns in margin of this note on the following terms, viz.: 1. Commission at the rate of 4 per cent. on all business done either through your own sheets, spot sales, or letter orders. 2. No commission to be paid on bad debts." Then the relations between the parties came to an end, and litigation followed. The plaintiff claimed a declaration that he was entitled to be paid by the defendants commission on all orders which they should thereafter receive from customers in the towns specified who were customers between April, 1896, and December, 1899, or, alternatively, who were customers introduced by the plaintiff; and he asked also for damages for breach of contract and illegal dismissal. Witnesses were called as to the length of notice which should be given in the case of a traveller, and Phillimore J. held that, on the evidence, the agreement could be terminated by notice, and that the notice given was a sufficient notice. Then the learned judge went on and disposed of the rest of the case in one sentence: "The plaintiff is not entitled to the declaration asked for because by the terms of the agreement the commission is payable, not on customers, but on custom." I have difficulty in understanding exactly what the learned judge meant, but it may be that the view which he took was that commission under the agreement was payable on all business done either through the plaintiff's own sheets, spot sales, or letter orders, and that that amounted to a provision that commission was to be payable on all business done by the plaintiff in any of these three ways, and that consequently orders which came in from customers, introduced by the plaintiff, after the termination of the relationship were not included.

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(1) 6 Com. Cas. 72.

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There is only one other case—*Weare* v. *Brimsdown Lead Co.* (1) There the plaintiff was employed by the defendants for twelve months as agent for the sale of white lead manufactured by them upon the terms that he was to receive 2½ per cent. commission upon all sales direct or indirect. The agreement was entered into in August, 1899, and after the expiration of twelve months the plaintiff remained in the defendants' service upon the same terms, so far as they were applicable. Avory J., with whom Phillimore J. agreed, said: "I think the question in this case is simply whether the parties contracted either that the plaintiff should be employed for all time or that he should be paid commission after he had left the defendants' service on orders given by customers previously introduced by him. The authorities which have been cited may all be reconciled in this way: in some of them the Court has construed the contract as implying a term that the plaintiff is to be employed for all time, or as implying a term that the plaintiff is to be paid commission after he has left his service. Applying that test to this case, I can find nothing in the terms of this contract importing either that the plaintiff was to be employed for all time or that he was to be paid commission on orders given by customers after he had left the defendants' service." In that case the agreement of employment was for a fixed term, and the learned judge came to the conclusion that the remuneration was only payable to the plaintiff in respect of orders obtained during the term of the employment.

The question in this case is one of construction, and I have come to the conclusion that under this agreement the plaintiff is entitled to commission on orders whenever received if they come from customers who have been introduced by the plaintiff.

The plaintiff's second claim in the present action is for damages for wrongful dismissal on the ground that he was entitled to reasonable notice. It was not attempted to prove a custom of the trade, but it was said that the plaintiff was entitled to reasonable notice. Now in this case there was in my opinion no employment in the strict sense of the term. The plaintiff was not the servant in any way of the defendant; he was not bound to do any work whatever. The agreement merely provided that, if the plaintiff introduced customers and if the orders were accepted by the defendant, then the plaintiff should be entitled to half of any profits which were derived from those orders. There was no obligation on the part of the plaintiff to do work for the defendant, nor was there any obligation on the part of the defendant to provide work for the plaintiff, but there was merely a provision that the defendant would in a certain event pay certain remuneration to the plaintiff.

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(1) 103 L. T. 429.

In those circumstances *Joynson* v. *Hunt & Son* (1) appears to me to be very much in point. That was a case which came before the Court of Appeal. The defendants wrote a letter to the plaintiff in these terms: "In reply to your favour I beg to say we will give the 2½ per cent. commission on all business you do for us in London, whether you send the buyers to buy or orders come through the post, or you take them and send them direct. You let us know to whom you show our samples, and, if business results from the transaction, we will forward your commission quarterly as you suggest. This refers to orders executed." The question in that case was whether the plaintiff was entitled to notice. The plaintiff tendered the evidence of witnesses to prove that there was a custom in the glove trade that six months' notice must be given to terminate the agency of a commission agent. The learned judge held that the defendants were entitled to terminate the agency without notice and rejected the evidence of the alleged custom. The plaintiff appealed, and the Court of Appeal held that the learned judge was right in rejecting the evidence as to custom on the ground that the custom would be inconsistent with the terms of the written agreement. Collins M.R. said: "Having examined carefully the terms of this particular contract, I have come to the conclusion that the learned judge was right in excluding evidence of the alleged custom. I think that the pleading in the statement of claim is somewhat misleading, inasmuch as it suggests an agreement between principal and agent to employ the agent, and sets up a custom in that employment. It seems to me to allege an employment of the plaintiff by the defendants as their agent, carrying with it the usual incidents of that employment. Then the defence sets out the exact terms of the bargain which are admitted. It seems to me that those terms exclude the essential factor of employment by the defendants of the plaintiff as their agent as part of the agreement. Those

(1) 93 L. T. 470, 471.

terms are contained in a letter from the defendants to the plaintiff as follows:"—then he reads the letter—"Now, that letter, it seems to me, does not import any requirement by the principal to the agent to do anything, or any undertaking that the agent shall be employed or that the agent shall do anything to obtain orders. It is contended that by custom this arrangement cannot be terminated except by notice. It seems to me that that would be inconsistent with the terms of the express agreement. The written agreement excludes any employment by the defendants of the plaintiff, and any obligation on the plaintiff to do any work at all. An implied term as to notice would be quite inconsistent, the terms of the express contract being such as to negative any added obligation to give notice to terminate the arrangement. The letter only expresses willingness to pay a certain commission if the defendants choose to accept any order which the plaintiff may choose to obtain for them." Romer L.J. and Mathew L.J. took the same view. There are earlier cases to the same effect—e.g., *Alexander* v. *Davis & Co.* (1), *Henry* v. *Lowson* (2), and *Motion* v. *Michaud.* (3)

In my opinion, therefore, on this part of the case, the plaintiff is wrong as he was not entitled to any notice whatever. There was no employment of the plaintiff, and therefore no wrongful dismissal.

[His Lordship then dealt with another issue in the case relating to the meaning and contents of a receipt given by the plaintiff to the defendant in February, 1916, but not calling for notice in this report, and continued :] The only question which remains is as to the exact form of relief. There has been a repudiation by the defendant of his obligation to pay in respect of repeat orders; accordingly there has been a breach of the contract, and, as was held by Mathew J., damages can be obtained for the breach of the contract. In *Faulkner* v. *Cooper & Co.* (4), which was a similar case, Mathew J. held that the plaintiff was entitled to damages for a breach of contract. He then proceeded to state what the measure of the damages was, in the following terms: "The question in this case must, therefore, in my opinion be treated solely as a question as to what sum is to be paid to the plaintiff by the defendant company as damages for the breach of contract. In deciding that question,

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(1) 2 Times L. R. 142.
(2) 2 Times L. R. 199.
(3) 8 Times L. R. 253, 447.
(4) 4 Com. Cas. 213, 215.

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I have to consider what amount of commission would have been earned by the plaintiff if the relations between him and the defendant company had not been broken off, and in arriving at a conclusion upon that point, I must take into account the chances of human life, the vicissitudes of trade, the probability of the plaintiff's customers ceasing to deal with the defendant company, and various other considerations." It appears to me that all those considerations, with one exception, ought to be taken into account in ascertaining the amount of damages. The exception is this—as the result of my judgment, the relationship between the plaintiff and the defendant has been properly determined, and the plaintiff is not entitled to commission on fresh customers whom he now seeks to introduce, and, therefore, it appears to me that it is impossible to say in the present case that any person who assesses the damages payable by the defendant ought to consider what amount of commission would have been earned by the plaintiff if the relations between him and the defendant had not been broken off, because that would necessarily let in the possibility of the plaintiff introducing fresh customers. What has to be ascertained is the present value of the probability or the possibility of the defendant receiving orders in the future from customers who were introduced by the plaintiff before the relations between him and the defendant were terminated.

Solicitors: *Isadore Goldman ; Humphreys, Phillips & Co.*

R. M.

In re FOWLER.

FOWLER *v.* FOWLER.

[1916 F. 797.]

C. A.

1917

PETERSON J.

Feb. 28; *March* 1, 2, 6, 15.

C. A.

July 5, 6, 9, 13.

Heirlooms—Money Fund—Trust for Devolution with Entailed Estate in Scotland—Proviso against absolute vesting in Heirs of Entail living at Testator's death—Validity—Disentail—Construction of Trust—Absolute vesting.

Chattels and a sum of 40,000*l.* were bequeathed by the testator, a domiciled Englishman, upon trust, so far as the rules of law and equity would permit, to allow the chattels to devolve as heirlooms and be enjoyed, and the income of the fund to be received, by the person or persons from time to time in possession or receipt of the rents and profits of the testator's entailed estates in Scotland, but so that the chattels and capital of the fund "should not vest absolutely in any person in the line of entail living at the testator's death but on the death of any such person should devolve"—as to the chattels, "as heirlooms with the estates to the person next in the line of entail," and as to the fund, "with the estates in like manner as if the said sum or investments had been land in Scotland and part of the said estates":—

Held by Peterson J.: (1.) That there was no such absolute gift in the first instance of the chattels or the fund as would render the provision against absolute vesting void for repugnancy; and that neither the first nor the second heir of entail, each of whom was living at the testator's death and succeeded to the estates but died without having disentailed, took an absolute interest in either the heirlooms or the fund, notwithstanding that by Scots law each of them as heir of entail took the whole fee in the entailed estates.

In re Stringer's Estate (1877) 6 Ch. D. 1 and *Shaw* v. *Ford* (1877) 7 Ch. D. 669 distinguished.

In re Lupton [1905] P. 321 and *In re Viscount Exmouth* (1883) 23 Ch. D. 158 applied.

(2.) That the plaintiff, the third heir of entail, who was also living at the testator's death and had disentailed, was not absolutely entitled to the chattels, inasmuch as the provision that they should devolve "as heirlooms with the estates to the person next in the line of entail" could not be disregarded, but operated to pass the chattels on his death to his successor in the line of entail.

Baroness Wesselenyi v. *Jamieson* [1907] A. C. 440 applied.

(3.) That, inasmuch as the capital of the fund was to devolve with the estates in like manner as if the fund had been land in Scotland and part of the estates, and as the plaintiff, being entitled under the trust to the income of the fund for life, had by disentailing made himself also the only person who was or could be actually entitled to the Scottish estates under or by virtue of the limitations of the settlement, he was now absolutely entitled in remainder to the capital of the fund.

In re Lord Chesham's Settlement [1909] 2 Ch. 329, *Lord Lilford* v. *Attorney-General* (1867) L. R. 2 H. L. 63, and *In re Trevanion* [1910] 2 Ch. 538 applied.

Hogg v. *Jones* (1863) 32 Beav. 45 distinguished.

On appeal as to the 40,000*l.* fund :—

Held, that the plaintiff on disentailing the Scottish estates became absolutely entitled in possession to the capital of the whole fund.

Decision of Peterson J. on this point affirmed.

ADJOURNED SUMMONS.

The testator, Sir John Fowler, a domiciled Englishman possessed of real estate in the county of Ross, Scotland, on July 22, 1896, made his will in English form, whereby after reciting that he had by a trust disposition mortis causa in the Scottish form, of even date, conveyed those estates to the trustees of his will in trust as soon as might be after his death to settle, entail, or convey them in manner directed by his will, he gave the following directions to his trustees : " I direct my trustees or trustee as soon as convenient after my death to execute dispositions and deeds of entail according to the law of Scotland of all and whole my said lands and estates . . . . described in and conveyed by the said trust disposition in favour of my eldest son John Arthur Fowler and the heirs male of his body whom failing my second son Percival Fowler and the heirs male of his body whom failing my third son Montague Fowler and the heirs male of his body whom failing my fourth son Evelyn Fowler and the heirs male of his body whom failing any other son or sons whom I may have successively in their order of seniority and the heirs male of the body or bodies of such son or sons whom failing any daughter or daughters I may have successively in their order of seniority and the heirs male of the body or bodies of such daughter or daughters whom all failing to heirs female of the bodies of my sons and daughters aforesaid born or to be born in the order aforesaid the eldest heir female always succeeding without division and excluding heirs portioners whom all failing my brother Frederick Fowler and his heirs."

After some intermediate bequests he settled certain pictures, furniture and chattels in the following terms : " I bequeath "—

then he described the specific effects—" unto my said trustees hereinbefore named Upon trust so far as the rules of law and equity will permit to allow the same to devolve as heirlooms and to be in the possession of and to be enjoyed by the person or persons who shall under the settlement to be made of my estates in the county of Ross in Scotland from time to time be in the possession or receipt of the rents and profits of that estate but so that the lastly bequeathed effects shall not vest absolutely in any person in the line of entail who shall be living at my death nor vest absolutely in any child of such last mentioned person unless and until such child shall attain the age of twenty-one years but on the death of any person in the line of entail living at my death or on the death under the age of twenty-one years of such child shall devolve as heirlooms with the estates to the next person in the line of entail."

Later in the will he settled the sum of 40,000*l.* in the following manner: " I bequeath to my trustees hereinbefore named the sum of 40,000*l.* or investments representing that sum upon trust to permit the person who shall under the settlement hereinbefore directed to be made of my estates in the county of Ross in Scotland from time to time be in possession of or entitled to the rents and profits of those estates to receive the interest and income of the said sum or investments and to cause the capital of the said sum or investments to devolve with my estates in Scotland so far as the rules of law and equity will permit but so that such capital shall not vest absolutely in any person in the line of entail who shall be living at my death nor vest absolutely in any child of such last-mentioned person unless and until such child shall attain the age of twenty-one years but on the death of any person in the line of entail living at my death or on the death under the age of twenty-one years of such child shall devolve with the said estates in like manner as if the said sum or investments had been land in Scotland and part of the said estates."

In 1898 the testator died, and thereupon his eldest son, Sir John Arthur Fowler, became the first heir of entail of the Scottish estates under the will. In March, 1899, Sir John Arthur died, and on his death his elder son, Sir John Edward Fowler, became the heir of entail of the Scottish estates.

In November, 1900, the trustees in pursuance of the directions in the will executed a deed of disposition and entail of the estates in Scotland, the limitations in this deed being the same as those in the will, except that, as Sir John Arthur had died, Sir John Edward as his eldest son was what in Scots law is known as the institute of entail under the deed.

In 1904 Percival Fowler, the testator's second son, died without issue, and on April 28, 1915, Alan Arthur, the younger son of Sir John Arthur Fowler, died leaving an only daughter, the infant defendant, Marjorie Mary Fowler, born in 1913.

Sir John Edward Fowler died a bachelor on June 22, 1915, and thereupon the plaintiff, Sir Montague Fowler, the third son of the testator, became heir of entail of the Scottish estates. He then barred the entail in the manner prescribed by Scots law and described by Peterson J. in his considered judgment in this case as follows:—"With the sanction of the Court he executed a deed dated May 11, 1916, by which he declared that the estates were held by him 'free from the conditions provisions and clauses prohibitory irritant and resolutive of the entail by virtue of the Entail Amendment Acts, 1848, 1852, and 1875, and the Entail (Scotland) Act, 1882.' The institute of entail or heir of entail (1) is a 'fiar' or absolute owner of the entailed estates burdened only with the fetters and conditions validly imposed by the terms of the entail, and this deed, as I understand, removed these fetters and conditions, but left the line of inheritance as in the entail. In order to alter the line of succession Sir Montague executed another deed, dated June 30, 1916, by which he conveyed the estates to himself, his heirs and assignees, in fee simple. He is thus what in England would be called the owner in fee simple of the Scottish estates."

The compensation approved by the Court of Session and payable to the persons disappointed by the barring of the entail, including the defendants Evelyn Fowler and Marjorie Mary Fowler, had been duly paid or provided for.

This was a summons by the plaintiff for a declaration that he was absolutely entitled to the heirlooms and fund and for delivery and payment of the same to him for his own sole use and enjoyment.

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(1) According to Scots law, the first named taker of an estate tail under an instrument of entail is called "the institute of entail," and the heirs male of his body and other subsequent takers of an estate tail under the same instrument are called "heirs of entail."

At the hearing the defendant, Lady Fowler, who was the widow and a trustee of the will of Sir John Arthur Fowler, and also an executrix of, and residuary legatee under, the will of her son Sir John Edward Fowler, was appointed to represent the latter's estate, but inasmuch as the claims of the respective estates of Sir John Arthur and Sir John Edward to the heirlooms and the fund, although depending on the same contentions as against the remaining defendants, were in conflict by reason of the fact that owing to his previous death Sir John Arthur never took any estate under the actual deed of settlement while Sir John Edward did, their rival claims were left open for subsequent consideration in the event of the main arguments common to both claims prevailing against those of the other defendants.

The summons came on for hearing before Peterson J. on February 28, 1917.

Tomlin, K.C., and *Leigh Ramsbotham*, for the plaintiff. This is the English will of a testator domiciled in England. His real estate has been duly settled according to Scottish law in pursuance of the directions in his will, and the question now is what is the effect of the gift of heirlooms and of the sum of 40,000*l.* having regard to the fact that the plaintiff, having duly disentailed, has made himself absolute owner of the Scottish estate. We submit that the plaintiff is now indefeasibly entitled to the heirlooms and settled fund. Sir John Arthur and Sir John Edward were both alive at the testator's death and came within the proviso against the absolute vesting of the heirlooms and fund. Neither of them disentailed, and their interests therefore were carried over on their deaths. The plaintiff also was alive at the testator's death, but by disentailing he has made himself absolute owner of the Scottish estate, and the result is that now he and his heirs are the only persons in the line of entail. It is clear that he is owner in fee simple under the limitations of the will: *In re Trevanion* (1); and he and his heirs are the only persons that can be interested: *Schank* v. *Scott.* (2) *Hogg* v. *Jones* (3) is distinguishable from this case. It was a decision on an entirely different clause; the disentailing deed only created a base fee, and the son of Anne never took an indefeasible interest at all.

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(1) [1910] 2 Ch. 538.
(2) (1874) 22 W. R. 513.
(3) 32 Beav. 45.

There has been an undoubted vesting in the plaintiff, he is entitled to the life interest and also in remainder, and we submit that there can be no question so far as the 40,000*l.* fund is concerned, and that the person entitled to the fund is also entitled to the heirlooms, for on the whole will the testator never contemplated that the heirlooms and money fund should devolve separately. The plaintiff and his heirs are the only persons who can be entitled, and in the circumstances of this case there is no inconsistency in "the next person in the line of entail" being the last preceding tenant for life himself. [They also referred to the form of trusts of chattels as heirlooms in Key and Elphinstone's Precedents in Conveyancing, 9th ed. vol. ii., p. 719; 10th ed. p. 786, and to the observations on such trusts by Mr. Jacob Waley in vol. iii., part i., "Settlements," of Davidson's Precedents and Forms in Conveyancing, 2nd ed. pp. 514–7; 3rd ed. pp. 624–7, and to *Lord Scarsdale* v. *Curzon.* (1)]

Dighton Pollock, for the defendant trustee of the testator's will, took no part in the arguments.

Cecil W. Turner, for the defendant Evelyn Fowler, the fourth son of the testator. Under the trusts of the heirlooms and fund there is to be a succession of life interests in those persons who were living at the testator's death, and they are not to take absolute interests. Those persons who are in the unbroken line of entail under the limitations of the real estate, and who were alive at the testator's death, are to take, not absolute, but only life interests, and in construing the will the deeds executed by the plaintiff ought to be regarded as disturbing the line of entail and as not giving him an absolute interest in the heirlooms and fund. The principle of *Hogg* v. *Jones* (2) applies.

Sir John Arthur never appeared in the Scottish deed of disposition and entail at all; therefore his estate cannot be entitled. Moreover, he never disentailed. Sir John Edward never disentailed and he cannot be entitled.

Upjohn, K.C., and *F. E. Farrer*, for the defendant Dame Alice Janet Clive Fowler. In the first place this defendant claims the

(1) (1860) 1 J. & H. 40.

(2) 32 Beav. 45.

heirlooms and money fund as sole executrix of her husband, Sir John Arthur Fowler, who, we submit, took as first tenant in tail an absolute interest in them immediately on the testator's death. It is no answer to that contention to say that it would be defeating the testator's intention. The intention of a testator as appearing in his will when construed is always liable to be defeated. No grosser case of that can be imagined than the case of *Foley* v. *Burnell.* (1)

The evidence on Scottish law shows that according to that law the institute of entail or the heir of entail is the absolute owner of the property burdened only with certain restrictions, and he took the whole fee : *Studd* v. *Cook.* (2) Sir John Arthur was institute of entail under the testator's will. But for his death before the execution of the settlement he would also have been institute of entail under that deed ; that, however, ought not to affect his rights, because in English law equity regards as done that which ought to have been done, and the will also saves the rights of parties pending the execution of the settlement. Sir John Arthur was, therefore, under the will the first taker of the estate, and, disregarding for a moment the proviso against absolute vesting, he was also the first taker of the heirlooms and fund, and, being owner in fee of the estate, he took the heirlooms and fund absolutely : *Foley* v. *Burnell.* (1)

Further, we submit that after an absolute gift the provision that the personalty shall not vest absolutely in any person living at the testator's death is repugnant and void. After an absolute gift in the first instance an executory limitation over to take effect on an event certain is bad ; the gift over must be on a future contingency, i.e., on an event uncertain : Fearne on Contingent Remainders, 7th ed. pp. 381, 399 ; Challis, Law of Real Property, 2nd ed. p. 161 ; *Carwardine* v. *Carwardine.* (3) A gift over, altering the devolution on the happening of an event—e.g. death, an event certain—simultaneous with the devolution according to law is bad ; per Fry J. in *Shaw* v. *Ford* (4), citing *Gulliver* v. *Vaux* (5), *Holmes* v. *Godson* (6), and *Ware* v. *Cann* (7) ; per James L.J. in *In re Stringer's Estate.* (8)

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(1) (1783) 1 Bro. C. C. 274 ; (1785) 4 Bro. P. C. 319.

(2) (1883) 8 App. Cas. 577, 599.

(3) (1758) 1 Eden, 27.

(4) 7 Ch. D. 669.

(5) (1746) 8 D. M. & G. 167, n.

(6) (1856) 8 D. M. & G. 152.

(7) (1830) 10 B. & C. 433.

(8) 6 Ch. D. 1, 15.

Where in law on the true construction of the gift the interest given is absolute, then if the gift over offends against the true character of the original gift the gift over is void: *Byng* v. *Lord Strafford* (1) (which case also disposes of any argument based on the intention of the testator); *Ross* v. *Ross* (2); *Attorney-General* v. *Hall* (3); *In re Machu* (4); *Mildmay's Case* (5); *In re Macleay* (6); *In re Rosher.* (7)

We submit, therefore, that Sir John Arthur Fowler took the heirlooms and the fund absolutely, and that the gift over on his death is repugnant and void, and that his original title holds good, and that his executrix is entitled to both.

But if it is said that Sir John Arthur was dead at the date of the settlement, and cannot come within the description of a " person who shall under the settlement to be made of my estates in the county of Ross from time to time be in the possession of or entitled to the rents and profits of that estate," then we submit that Sir John Edward Fowler, who was institute of entail under the settlement when executed, fulfils that description, and that, for the reasons urged above in the case of Sir John Arthur, Sir John Edward took an absolute interest in the heirlooms and fund which passed to this defendant, Lady Fowler, who is his residuary legatee and also an executrix under his will.

The plaintiff claims now to be entitled absolutely to the heirlooms and the fund, but he was living at the testator's death, and every interest he takes is subject to the proviso against his taking an absolute interest, assuming for this purpose that such a proviso is good. There is no real difference between the manner of devolution of the heirlooms and the fund, for there is the common object underlying both gifts of keeping them and the Scottish real estate together. So far as he claims a life interest he is bound by the proviso, and if he claims as remainderman then he claims, not as a person in the line of entail, but as the disponee under the deed of June 30, 1916, and as such he cannot say that the personalty would devolve on him as the next person entitled in remainder in the line of entail, for he claims under the deed, not under the settlement.

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(1) (1843) 5 Beav. 558, 567.
(2) (1819) 1 Jac. & W. 154.
(3) (1731) 1 Jac. & W. 158, n.
(4) (1882) 21 Ch. D. 838.
(5) (1606) 6 Rep. 40a.
(6) (1875) L. R. 20 Eq. 186.
(7) (1884) 26 Ch. D. 801.

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In re Trevanion (1) was a case on English law alone, and neither that case nor the other cases cited have any bearing on the question in this case.

Hughes, K.C., and *Howard Wright*, for the defendant Marjorie Mary Fowler, the infant daughter of Sir John Arthur Fowler's younger son. There is no repugnancy in this gift. There is no absolute gift in the first instance at all, nothing being given but use and enjoyment, and the proviso against absolute vesting is part and parcel of the gift. This trust is almost identical with the earlier portion of the trust in *In re Viscount Exmouth* (2), which Fry J. held to confer a life interest. Recent decisions have gone a long way to modify the doctrine of repugnancy: *Comiskey* v. *Bowring-Hanbury.* (3) In *Sherratt* v. *Bentley* (4) a gift prima facie absolute was restricted to a life estate by a subsequent provision. The latter case and *In re Bagshaw's Trusts* (5) were dealt with in *In re Lupton* (6), where an absolute gift was held to be cut down. *In re Stringer's Estate* (7) is also a case where an absolute interest was cut down to a life estate. We submit that on the true construction of this will every heir in tail living at the testator's death took no more than a life estate, and that there is no repugnancy. The trusts of the heirlooms and fund are both negative and positive and can be paraphrased thus: "Upon trust that no one of my four sons or any of their children living at my death nor a child born after my death and dying under twenty-one of any such person shall take absolutely, but subject as aforesaid to hold the heirlooms and fund upon trust to permit the person who shall under the settlement directed to be made of my Scottish estate from time to time be in possession of or entitled to the rents and profits thereof to use and enjoy the heirlooms and receive the interest of the fund" as in the will mentioned. As thus paraphrased the trusts do not offend against any rule of English law, and under them neither Sir John Arthur, Sir John Edward, nor the plaintiff can ever be entitled to an absolute interest inasmuch as no one of them is an object of the trusts relating to the absolute interest.

(1) [1910] 2 Ch. 538.
(2) 23 Ch. D. 158.
(3) [1905] A. C. 84; sub nom. *In re Hanbury* [1904] 1 Ch. 415.
(4) (1834) 2 My. & K. 149.
(5) (1877) 25 W. R. 659.
(6) [1905] P. 321.
(7) 6 Ch. D. 1.

Further, Sir John Arthur Fowler died before the settlement was executed and never came within the description of a person in possession "under the settlement to be made." Sir John Edward never took more than a life estate in the heirlooms and fund.

The plaintiff also is not entitled under the settlement, because, having disentailed, he has ceased to take under that. Regard must be had to the will alone to find what is the devolution and who is entitled, without interference from and undisturbed by any foreign cause ; the disentailing deed cannot alter the devolution of the heirlooms and fund : *Hogg* v. *Jones* (1) ; *In re Petre's Settlement Trusts* (2) ; *Baroness Wesselenyi* v. *Jamieson.* (3) The plaintiff has failed to show any title to have the heirlooms or fund handed over or paid to him.

Tomlin, K.C., in reply. There is no foundation for the argument against the plaintiff so far as it is based on repugnancy. It is true that a testator cannot interfere with the devolution of real or personal property according to law after once making an absolute gift, but in the present case there is no absolute gift in this sense any more than in the line of cases represented by *O'Mahoney* v. *Burdett* (4), which, if the argument against the plaintiff is sound, might have been decided on a similar footing.

As regards the 40,000*l.* legacy, under the terms of the will, the capital of this fund is to devolve with the estates, and therefore vested absolutely in the plaintiff as the absolute owner of the estates under the deed of June 30, 1916, which was executed under and by virtue of the limitations of the settlement. [He referred in the course of his reply to *Trafford* v. *Trafford* (5), *Schank* v. *Scott* (6), *In re Parker* (7), *In re Beresford-Hope* (8), *In re Earl Caledon* (9), *In re Petre's Settlement Trusts* (2), *In re Lord Chesham's Settlement* (10), *In re Fothergill's Estate* (11), *In re Angerstein* (12), and *Hogg* v. *Jones.* (13)]

The bequest of the heirlooms stands on the same footing notwithstanding the additional words referring to "the next person in the line of entail," which should be construed so as to include Sir Montague, his heirs and assigns, who fill that character, in the events which have happened.

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(1) 32 Beav. 45, 54-5.
(2) [1910] 1 Ch. 290.
(3) [1907] A. C. 440.
(4) (1874) L. R. 7 H. L. 388.
(5) (1746) 3 Atk. 347.
(6) 22 W. R. 513.
(7) [1910] 1 Ch. 581.
(8) [1917] 1 Ch. 287.
(9) [1915] 1 Ch. 150.
(10) [1909] 2 Ch. 329.
(11) [1903] 1 Ch. 149.
(12) [1895] 2 Ch. 883.
(13) 32 Beav. 45.

[*Hughes, K.C.*, referred to *Parr* v. *Parr* (1) as to the meaning of the word "devolve."]

Upjohn, K.C., replied on the cases and referred to *Gower* v. *Grosvenor*. (2)

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March 15. PETERSON J. In this case the plaintiff claims that he is absolutely entitled to certain heirlooms and a sum of 40,000*l.* which are settled by the will of Sir John Fowler. The defendants, with the exception of Frederick Fowler, who is the sole trustee of the will, unite in opposing this claim; but Mr. Upjohn on behalf of Lady Fowler, who is a trustee of the will of Sir John Arthur Fowler, the eldest son of the testator, and is also an executrix of the will of Sir John Edward Fowler, and residuary legatee under that will, contended that the heirlooms and the sum of 40,000*l.* were the absolute property of Sir John Arthur Fowler or of Sir John Edward Fowler. Since these two estates were not separately represented any question between them cannot be determined on the present occasion; but as the arguments in support of the claims of these two estates are, as against the other parties to this action, the same, I heard them on the basis that if I acceded to the argument the question between them should be left open for subsequent consideration. Lady Fowler was therefore appointed to represent the estates of Sir John Edward, and the summons will be amended by raising the question whether Sir John Arthur or Sir John Edward became entitled to the heirlooms and the sum of 40,000*l.* [His Lordship then stated the material parts of the will and the facts as above set out, and continued:] For the purposes of this case it is necessary to bear in mind that Sir John Edward Fowler as well as Sir John Arthur Fowler, Percival Fowler, the plaintiff, and the defendant Evelyn Fowler were living at the testator's death.

The question which I have to determine is whether Sir John Arthur under the will or Sir John Edward as institute of entail

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(1) (1833) 1 My. & K. 647. (2) (1740) Barn. Ch. 54, 57, 62, 63.

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under the deed of entail became absolutely entitled to the heirlooms and the investments representing the sum of 40,000*l.* or whether the present plaintiff has become absolutely entitled to them. In the event of none of these three being entitled the question who ultimately is entitled cannot be determined at present.

I will first deal with the contention of Lady Fowler as representing the estate of Sir John Arthur and Sir John Edward. The heirlooms were given by the will to the trustees upon trust, so far as the rules of law and equity will permit, to allow the same to devolve as heirlooms and to be in the possession of and to be enjoyed by the person or persons who under the settlement of the Scottish estates should be in the possession or receipt of the rents and profits of those estates. This admittedly, if it stood by itself, would vest the chattels absolutely in Sir John Arthur as the holder of the first estate tail, if he is to be treated as if he was the institute of entail under the settlement, or, if he cannot be so treated, then in Sir John Edward as the first owner of an estate tail under the settlement. The will, however, provided that the chattels should not vest absolutely in either of them as both of them were living at the testator's death, but should devolve as heirlooms with the Scottish estates to the next person in the line of entail. To meet this difficulty it was contended that the will operated as an absolute gift to Sir John Arthur or to Sir John Edward, and that the subsequent provisions were repugnant to the absolute gift and therefore void.

My attention was called to various cases in which restrictions upon the enjoyment of an absolute gift had been held to be inconsistent with the gift, and there is no doubt that, apart from the case of an executory limitation, subsequent provisions which are inconsistent with a preceding absolute gift are void for repugnancy: see the case of *In re Stringer's Estate.* (1) In a similar way it has been held that an executory devise defeating or abridging an estate in fee by altering the course of its devolution, which is to take effect at the moment of devolution and at no other time, is bad: *Shaw* v. *Ford.* (2) But these doctrines have no application if the gift is not absolute; and the first question necessarily is one of construction, namely, whether the gift is in fact absolute. For this purpose it is necessary to look at the whole of the relevant portions of the will

(1) 6 Ch. D. 1.

(2) 7 Ch. D. 669.

in order to see whether the testator has in fact given an absolute interest which he has subsequently attempted to restrict, or whether he has only given a limited interest. The testator was at liberty, if he thought fit, to give by means of a trust only a life interest in the chattels to any of his sons who were living at his death, and the question is whether on the true construction of his will the interest which he has given to such a son is an interest limited to his life. There are many cases in which a provision which would, if it stood by itself, amount to an absolute gift has been held to be only a life interest, as, for instance, in *In re Lupton* (1) and *In re Stringer's Estate* (2) and *In re Viscount Exmouth* (3), where a testator bequeathed chattels to trustees upon trust to permit the same to go and be held and enjoyed with the title, so far as the rules of law and equity would admit, by the person who for the time being should be actually possessed of the title in the nature of heirlooms, and so that no person in existence at the time of the testator's death should have any other than a life interest, and the learned judge expressed the view that while the first part of the clause, standing by itself, would give an absolute interest to the first holder of the title, the second part of the clause, which began with the words "and so that," clearly reduced the interest to a life interest.

In the case before me the passage in the will on which Lady Fowler relies is followed by the words "but so that the chattels shall not vest absolutely in any person in the line of entail who shall be living at my death but on the death of such person shall devolve as heirlooms with the estate to the next person in the line of entail." It was contended that the effect of the clause which deals with the heirlooms was necessarily to give them to Sir John Arthur and his heirs male and in default to Percival Fowler and his heirs male, and so on through the line of the testator's sons and daughters, and that a gift over on the death of a person to whom they had been given in this way was void. But I am unable to come to the conclusion that this is what the testator has done. He was regarding the "persons in the line of entail," and he shows that by that expression he does not mean only his sons and daughters, for he treats a child of a son or daughter of his as being a person in the line of entail. In my opinion "persons in the line of entail" are all those persons who are capable of taking under the entail. As a matter of construction it is to my mind clear that the testator desired that all persons capable of taking the Scottish estates under the entail should, so far as the law would permit, have the use and enjoyment of the chattels. But, recognizing that he could not tie up the chattels to the same extent as was allowed in the case of the land, and unless he made the necessary provision the institute or first heir of entail would acquire an absolute interest in the chattels, he directed that no person capable of taking under the entail who was living at his death, or being a child of any such person failed to attain the age of twenty-one years, should have more than a life interest in the chattels. In effect the trustees are directed to hold the chattels for the benefit of the persons who are capable of taking under the entail, but in such manner that any such person who is living at the testator's death, or the child of any such person living at the testator's death who fails to attain the age of twenty-one years, should only take a life interest in the chattels. The doctrine of repugnancy is applicable where there is an absolute gift, but in the present case there is no absolute gift to those persons in the line of entail who are living at the testator's death. On the contrary the testator has only given them life interests in the chattels.

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(1) [1905] P. 321.
(2) 6 Ch. D. 1.
(3) 23 Ch. D. 158.

In my judgment these words form part of the original gift and describe the interest which any person in the line of entail who is living at the testator's death is to take in the chattels. The testator first states that the person in possession or receipt of the rents of the settled estates is to enjoy the chattels, and he then proceeds to define what is the nature of the enjoyment which a person living at his death is to have. In my opinion neither Sir John Arthur Fowler nor Sir John Edward Fowler was entitled to the chattels absolutely. For similar reasons I am of opinion that the sum of 40,000*l.* did not vest absolutely in either Sir John Arthur or Sir John Edward.

The remaining question is whether the plaintiff, who has barred the entail and become the owner in fee simple of the Scottish estates, is now absolutely entitled to the heirlooms or to the investments representing the 40,000*l.* He also was living at the testator's death, and consequently, having regard to the opinion which I have expressed in the case of Sir John Arthur Fowler and Sir John Edward

Fowler, he can only claim the absolute interest in the chattels and the 40,000*l.* by virtue of the gift over on his own death.

Mr. Tomlin, for the plaintiff, accordingly argued that as he was now the only person interested in the Scottish estates he was absolutely entitled to the chattels under the direction that on his death they should devolve as heirlooms with the estates to the person in the line of entail. Stress was laid upon the direction that the chattels should devolve with the estates, and it was contended that this showed that they should in all circumstances follow the destination of the estates. The testator appears to have contemplated that the heirlooms should accompany the estates. That no doubt is the intention of all testators who settle heirlooms, but the testator has not confined himself to a direction of this simplicity, for he has provided that the chattels should devolve as heirlooms with the estates to the next person in the line of entail. The person who is to take the heirlooms on the death of the plaintiff is the next person in the line of entail, that is to say, the person in the line of entail who immediately succeeds the plaintiff. It may be that he must also be able to say that he holds the estates, but that is not a question which is at present ripe for discussion. It is essential in any case that he should be the next person in the line of entail. Now "the line of entail" refers to the limitations of the Scottish estates. The person next to the plaintiff in the line of entail will be his son if he has one, or the defendant Evelyn Fowler, or one of the other persons interested under the limitations which take effect on the plaintiff's death; but it is not the plaintiff himself. In my view the plaintiff's claim to the absolute interest in the chattels could only be supported if the words "to the next person in the line of entail" were disregarded, and, as effect must be given to them, the plaintiff's claim under this head in my opinion fails.

I am supported in this view by the decision of the House of Lords in *Baroness Wesselenyi* v. *Jamieson.* (1) In that case a testator, after directing his trustees to entail his Scottish estates upon a series of heirs, specified in a tailzied destination clause, gave beneficial interests in the residue of his estate to the heir for the time being entitled to succeed under the deed of entail upon his attaining the age of twenty-four. When he attained twenty-one the institute heir

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(1) [1907] A. C. 440, 448.

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of entail barred the entail and died under twenty-four. He devised the Scottish estate to his father, Sir Allan, and on Sir Allan's death it descended to Sir Victor Mackenzie. Sir Victor was the person who would have been entitled to the residue if the entail had not been barred. It was contended that only the heir of entail who succeeded to the entail of the Scottish estates could take the residue, and that as there was, owing to the disentail, no person who would answer this description the testator's residue went as on an intestacy. Their Lordships came to the conclusion that, although the deed of entail was no longer operative, it still indicated the heir who was to take the residue under the codicil, and, as Lord Robertson said, "the substance of a bequest of residue is the choice of persons; and Sir Victor is the designated person." In other words, although the entail had been terminated by the disentailing deed, the Court looked at the "tailzied destination," or persons mentioned or indicated in the entail, for the purpose of ascertaining who was the person designated by the testator to take the residue.

The trusts of the sum of 40,000*l.* require separate consideration, as they differ in some important respects from the trusts of the chattels. The testator draws a distinction between the capital and income of this fund. The income is to go to the person who under the settlement of his Scottish estates is from time to time in possession of or entitled to the rents of the Scottish estates, while the capital is to devolve with the Scottish estates so far as the rules of law and equity will permit, but so that any person in the line of entail who is living at the testator's death, or any child of any such person who should not attain twenty-one years of age, is only to take a life interest. These provisions appear to me to have the same effect as if they had consisted of the simple direction that the fund should devolve with the Scottish estates so far as the rules of law and equity would permit, with a provision that persons in the line of entail living at the testator's death and children of such persons who died under twenty-one should only take life interests. The clause then provides that on the death of any person in the line of entail living at his death, or on the death under twenty-one of the child of any such person, the fund shall devolve with the said estates in like manner as if it had been land in Scotland and part of the testator's Scottish estates. Mr. Tomlin contended that on Sir

Montague's death the fund would go to the person who then was in fact entitled to the estates, and that as Sir Montague had made himself the absolute owner of the estates he was entitled not only to a life interest in the fund but also to the capital, while his opponents argued that on Sir Montague's death the fund would go to the next person in the line of entail as in the case of the heirlooms.

The question is ultimately one of construction, and may be put in this way: Is this a gift on the death of Sir Montague to the person who then is by virtue of the limitations in the settlement in fact the limited or absolute owner of the estates, or is it a gift to the person who under the limitations of the settlement is the next person in the line of entail who would have been entitled to the estates if Sir Montague had not barred the entail? It was suggested that the use of the word "devolve" in the direction that the fund should "devolve with the estates" showed that the fund was to pass from a dead to a living son: *Parr* v. *Parr* (1); but this cannot be the effect of the word in this passage, for if the estates had not been disentailed and the person next after Sir Montague had been an heir of entail whose interest in the fund was not restricted to a life interest he would have taken the fund absolutely whether he survived Sir Montague or not. In this case the effective direction is that the fund shall go with the estates as if it formed part of the estates. The words "with the estates" cannot be treated as mere surplusage, but are an essential part of the trust, and indicate that only a person who is entitled to the estates can be an object of the trusts of the fund: see *In re Lord Chesham's Settlement.* (2) Nor does the fact that Sir Montague has disentailed the estates prevent him from saying that, though he is owner in fee simple, he is entitled under or by virtue of the limitations in the settlement. His estate tail carried with it the potentiality of its conversion into an estate in fee and enabled him to render his estate perpetual: *Lord Lilford* v. *Attorney-General* (3); *In re Trevanion.* (4) It was contended that while this was true in the case of an English disentailing deed it was not so where a Scottish estate was disentailed, because the second deed which is required by Scots law destroyed the entail. I am not able to accede to this argument, for I cannot see any difference but

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(1) 1 My. & K. 647.
(2) [1909] 2 Ch. 329.
(3) L. R. 2 H. L. 63.
(4) [1910] 2 Ch. 538.

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one of form between the process which is adopted in England and that which is required in Scotland. The same result, the conversion of an estate tail into a fee simple estate, is attained in England by one deed executed with the concurrence of the protector of the settlement, if there is one, and in Scotland by two deeds with the sanction of the Court. Sir Montague is therefore, in my opinion, the person, and the only person, who is or can be actually entitled to the Scottish estates under or by virtue of the limitations in the settlement.

In my judgment the true effect of this will in the events which have happened is to give the fund in question to him after his death. Having thus the whole interest in the fund he is absolutely entitled to it.

Hogg v. *Jones* (1) was quoted as an authority which is opposed to this conclusion, but, whether or not that decision is open to the criticisms which have been directed against it, the frame of the gift is different from the provisions of the present will.

R. M.

C. A.

The defendant Marjorie Mary Fowler appealed from this decision so far as it decided that the plaintiff was absolutely entitled to the 40,000*l.* fund. The appeal was heard on July 5, 6, 9, 1917.

Hughes, K.C., and *Howard Wright*, for the appellant.

Tomlin, K.C., and *Leigh Ramsbotham*, for the respondent Sir Montague Fowler.

Dighton Pollock, for the respondent trustee of the testator's will.

Cecil W. Turner, for the respondent Evelyn Fowler.

The arguments on the point raised by the appeal were substantially the same as those used in the Court below. The following additional authorities were cited :—*Sackville-West* v. *Viscount Holmesdale* (2); *Martelli* v. *Holloway* (3); *In re Cornwallis* (4); Preston on Estates, vol. i. p. 471; Vaizey on Settlements, vol. ii. p. 1339; Jarman on Wills, 6th ed. vol. i. p. 699.

Cur. adv. vult.

(1) 32 Beav. 45.

(2) (1870) L. R. 4 H. L. 543.

(3) (1872) L. R. 5 H. L. 532.

(4) (1886) 32 Ch. D. 388.

July 13. The following judgments were delivered :—

SWINFEN EADY L.J. This is an appeal from the judgment of Peterson J., and it raises a question as to the destination of a fund of 40,000*l.* settled by the will of the testator, Sir John Fowler. [His Lordship then stated the material parts of the will and the facts, and continued :] It appears that according to the Scottish law a tenant in tail, upon going through certain legal forms and upon making such compensation to persons disappointed by his barring the entail as may be approved by the Court of Session, may effectually bar the entail and become absolutely entitled to the land in fee. Sir Montague Fowler, the fourth baronet, has duly taken those steps which by the law of Scotland are necessary and has effectually barred the entail. He has had to make certain compensation to his younger brother, Evelyn, and to other persons in line of entail, especially to Marjorie, the daughter of Alan Arthur, the compensation payable to her being upwards of 11,000*l.* But the compensation has been duly paid or provided for, the proper deeds executed and enrolled, and all proper steps taken. It is not disputed by any of the parties that the entail has been effectually barred, or that Sir Montague Fowler is now absolutely entitled to the land.

The question arises, What is his interest in the 40,000*l.* ? Is he absolutely entitled to that now, as he claims, or, as it is said, is he only entitled for his life, and on his death is it to go as if it were land to the next person who would have been the heir of entail if the entail had been still subsisting ? It will be observed that there is not any trust to invest the 40,000*l.* in the purchase of land. The fund is settled "to devolve with my estates" or to devolve "with the said estates." There is not any bequest of the money, except so far as contained in that direction as to its devolution. There is no gift in terms to the next heir of entail or to any persona designata.

According to English law, if money or chattels are settled so as to be held and enjoyed by the persons from time to time entitled to the possession of settled real estate, they vest in the first tenant in tail immediately on birth. This result is usually obviated by a provision that they are not to vest in any tenant in tail by purchase unless he lives to attain twenty-one. It is also possible by apt words further to postpone the vesting until the estate of a tenant in tail by purchase becomes an estate in possession.

In the present case there are not any tenancies for life in the real estate. The testator gave to each of his sons in succession an estate in tail male; he probably contemplated that the entail would continue for many years, because while directing that the 40,000*l.* capital is not to vest absolutely in any person in the line of entail who shall be living at his death he also directs that it "shall devolve with the said estates in like manner as if the said sum or investments had been land in Scotland and part of the said estates." He does not contemplate any person taking the fund who does not succeed to the land, and the only gift of the money is by reference to the land. The expression "line of entail" is not a technical term in use among conveyancers in England, and the affidavit of Mr. McPhail states that it is not a technical term in Scots law. I can only interpret the will of the testator when using the expression "line of entail" as meaning so long as there is a line of entail or until the entail has been barred. After that has been completed there is no longer an entailed estate—no longer a line of entail. When the testator says that "such capital shall not vest absolutely in any person in the line of entail who shall be living at my death," I understand him to mean shall not vest absolutely in any person taking under my will as tenant in tail and so long as he only holds as tenant in tail. When, however, a line of entail no longer exists, and when a tenant in tail has been converted into an absolute owner of the land in Scotland forming the estate, the capital can only devolve with the estate by becoming the absolute property of the owner of the estate. So long as the line of entail exists and the land devolves from one tenant in tail to another tenant in tail, effect can and must be given to the direction of the testator that the capital is not to vest absolutely in any person in the line of entail living at the testator's death; but so soon as the line of entail is broken and comes to an end by the entail being barred, and the estate cannot devolve under the will on any other person because he is in the line of entail, then that direction of the testator ceases to operate; and the only effect which can be given to his further direction that the money is to devolve with the estates and as if it had been part of the estates is to hold that the devisee becoming absolutely entitled to the land thereupon (but not previously on succeeding to a tenancy in tail) becomes absolutely entitled to the money too. The object and effect of the provision " but so that such capital shall not vest absolutely in any person in the line of entail who shall be living at my death nor vest absolutely in any child of such last-mentioned person unless and until such child shall attain the age of twenty-one years " is to prevent the 40,000*l.* vesting absolutely in a limited owner. This construction reconciles every part of the clause containing the bequest of the 40,000*l.*, and no part of it becomes inconsistent with any other part. So long as there is a " line of entail " and a person entitled to the land who is not an owner in fee the money devolves with the said estates. When the line of entail comes to an end and the last tenant in tail becomes absolutely entitled to the land, the clause preventing the vesting of an absolute interest in the money ceases to operate.

For these reasons I am of opinion that Sir Montague Fowler on disentailing became absolutely entitled to the 40,000*l.* fund, and that the judgment of Peterson J. was correct and this appeal fails. We differ a little on the question of form. The learned judge arrived at the conclusion that Sir Montague would take by way of remainder after his life estate. The view I take is that upon disentailing Sir Montague immediately became entitled to the interest in possession of the whole fund.

BANKES L.J. The question for decision in this appeal is whether the construction put by the learned judge in the Court below upon one clause in the will of the late Sir John Fowler is correct. The clause is the one relating to the settlement of a sum of 40,000*l.* By an earlier clause in the will the testator had directed his trustees to execute dispositions and deeds of entail of his Braemore estate in favour of his four sons John Arthur, Percival, Montague, and Evelyn successively and their heirs male. In the events which happened the estate under the entail thus created passed upon the death of the testator in November, 1898, to his eldest son John Arthur. Upon the latter's death in March, 1899, he was succeeded by his son Sir John Edward. Upon the death of the latter in June, 1915, he was succeeded by his uncle the testator's third son, Sir Montague, the present baronet. In June, 1916, Sir Montague

Fowler disentailed the estate in accordance with the law of Scotland, and this action was brought for the purpose of obtaining a decision as to Sir Montague's interest in the sum of 40,000*l.* bequeathed by the testator as an addition to the Braemore estate. The clause in question deals separately with the income and with the capital of the fund. Different language is used in the two parts of the clause to indicate the persons who are to benefit by the testator's bounty. We have been referred by the appellant's counsel to a number of cases which might have been of assistance had the clause stopped after making provision for dealing with the income of the fund; but taking the clause as a whole, and having regard to the very special language of that part of the clause which deals with the capital of the fund, these authorities, in my opinion, afford no assistance as to the construction to be put upon the clause. In approaching this question of construction it is necessary to realize certain matters which it is admitted the testator must have had in mind when making any disposition of this fund so that it might devolve with the estate. One is that by the law of Scotland any heir of entail could, if so minded, disentail the estate upon making compensation to the parties interested; another is that unless special provision was made to exclude the operation of the rule laid down in *Foley* v. *Burnell* (1) the first tenant in tail would take an absolute vested interest in the fund; and a third was that provision must be made to meet the rule against perpetuities.

Taking the clause as a whole, the dominant intention of the testator appears to me to be clear. It was that the fund should devolve with the estate, and that the person in possession of or entitled to the rents and profits of the estate under the settlement created by the directions of the testator's will should be entitled to the income of the fund. The clause commences by dealing with the income of the fund, and then proceeds to deal with the capital. This latter portion may be divided into two branches—the first, which declares the intention of the testator, and the second, which contains directions inserted for the purpose of carrying that intention into effect. The appellant cannot avoid the difficulty that on her construction the first or negative direction, though inserted for the purpose of carrying out the testator's intention, has, in the view I

(1) 1 Bro. C. C. 274.

take of that intention as expressed in the clause, and in the events which have happened, the exactly opposite effect. On the other hand, the contention of the respondent, if adopted, gives full effect to every part of the clause, and allows the fund to follow the estate instead of being entirely divorced from it. The opposing contentions really centre round the expression in the negative clause "person in the line of entail." The appellant contends that the clause should be read for present purposes as though the names of each of the testator's four sons had been inserted in the clause instead of the general expression "person in the line of entail." Thus read it is said Sir Montague never became an object of the trust, and cannot by any act of his own bring himself within the operation of the clause. On the other hand, the respondents say that that part of the negative clause containing the expression is inserted merely to prevent the operation of the rule in *Foley* v. *Burnell* (1), and that when the entail came to an end in consequence of the disentailing of the estate by Sir Montague (an event which the testator must have contemplated as possible) there ceased to be any necessity for the clause or any reason why it should continue in operation. They contend, therefore, that the expression must be limited to persons who are in possession of or entitled to the rents and profits of the estate as the institute or a substitute heir of entail under the settlement created by the testator's will, and that as Sir Montague ceased to come within this definition when he disentailed the estate the negative clause ceases to apply to him and the fund must go as directed in the last part of the clause. This construction of the clause appears to me to be the right one. It applies what seems to me to be a perfectly reasonable meaning to the expression "in the line of entail," and by applying that meaning gives effect to what appears to me quite clearly to be the dominant wish of the testator.

I think the appeal fails.

WARRINGTON L.J. The testator, Sir John Fowler, bequeathed to his trustees the sum of 40,000*l.* upon certain trusts expressed in the following terms: [His Lordship read the clause and continued :] The Scottish estate therein mentioned was by the testator directed to be settled in favour of his sons successively in tail male, with remainders over under which, on failure of issue male of all the sons, Marjorie, the infant daughter of a grandson of the testator, would come next in order of succession.

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(1) 1 Bro. C. C. 274.

Sir Montague Fowler, the third son of the testator, succeeded to the estates in June, 1915, and shortly afterwards took the necessary steps under Scottish law for barring the entail, and thereby acquired the fee simple. The question is whether he thereupon became entitled also to the 40,000*l.* fund. Peterson J. has held that he did. Marjorie appeals from that decision. The question turns entirely on the true construction of the clause I have read, and I think resolves itself into the narrower question, What is the meaning of the expression " any person in the line of entail " ? Under Scottish law an entail has much the same effect as a series of estates in tail under English law. The heir of entail for the time being in possession is unable to make any disposition of the land, and on his death it will pass to the next heir of entail, but subject to these conditions he is the owner of the land and not a mere life renter. In terms of English law he has an estate of inheritance.

I now turn to the clause in question. The first direction is as to income: in regard to this there is no difficulty. Then come the words " and to cause the capital to devolve with my estates in Scotland so far as the rules of law and equity will permit." It is undisputed, and is indisputable, that if there were nothing more in the provision the capital of the fund would vest absolutely in the first heir of entail as the first person obtaining an estate of inheritance in the land: *Foley* v. *Burnell*. (1) But the testator proceeds to impose an impediment in the way of this absolute vesting in the following terms: " but so that such capital shall not vest absolutely in any person in the line of entail who shall be living at my death nor vest absolutely in any child of such last-mentioned person unless and until such child shall attain the age of twenty-one years but on the death of any person in the line of entail living at my death or on the death under the age of twenty-one years of such child shall devolve with the said estates in like manner as if the said sum or investments had been land in Scotland and part of the said estates." What is the meaning of " a person in the line of entail " ?

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(1) 1 Bro. C. C. 274.

I think it is clear that to come within the description the person in question must be one on whom the estates have devolved as heir of entail and on whose death they would again devolve on some other person as heir of entail. The expression seems to me to contemplate a succession of heirs of entail of whom the person in question is one. If this is the true meaning, then so soon as Sir Montague acquired the fee simple the succession comes to an end, he ceases to be entitled as heir of entail, and there is no other heir of entail to come after him. He no longer comes under the description, the impediment against absolute vesting no longer applies to him, and he becomes entitled to the fund under the initial direction to the trustees to cause the capital to devolve with the estate in Scotland.

For these reasons I think the decision appealed from was right, and the appeal must be dismissed.

Solicitors: *Halligey & Co.; Lawrence, Graham & Co.; E. F. Turner & Sons; Farrer & Co.; Freshfields.*

W. I. C.

In re SMYTH.

EDWARDS *v.* SMYTH. (1)

[1915 S. 1451.]

SARGANT J.
1917
May 15, 16.

Revenue—Estate Duty—Timber—Proceeds of Sale—Incidence of Duty—Tenant for Life and Remainderman—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 61, *sub-s.* 5—*Finance Act*, 1912 (2 *&* 3 *Geo.* 5, *c.* 8), *s.* 9—*Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 9.

Sect. 61, sub-s. 5, of the Finance (1909–10) Act, 1910, as amended by s. 9 of the Finance Act, 1912, relating to the estate duty on timber, is to be construed in the light of s. 9 of the Finance Act, 1894, which throws the liability for estate duty in respect of property not passing to the executor as such ultimately on the persons taking the benefit of such property. And as, under the Act of 1912, the duty attaches on the net moneys received from the sale of timber, a tenant for life not impeachable for waste, who receives the proceeds of timber sold apart from the land, has to bear the duty thereon, and such duty is not, since the recent Acts, as prior thereto it was, a charge on the full value of the land including the value of the timber.

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(1) This case was argued and decided in chambers, and the report is published with the assent of Sargant J.

Quaere, whether the general expression used in both of the sections of the Acts of 1910 and 1912, "the owners or trustees of such land," may not include a tenant for life who has power to sell the timber and keep the proceeds.

By her will, dated June 28, 1913, Dame Emily Frances Smyth, of Ashton Court in the county of Somerset, widow, after appointing her son William Henry Greville Edwards and Charles Henry Cave and William St. John Fenton Miles (in the will called St. John Miles) executors and trustees thereof and trustees for the purposes of the Settled Land Acts, 1882 to 1890, devised her mansion-house at Ashton Court and all her freehold manors, lands, hereditaments, and other freehold estates, subject to certain annuities in favour of her son-in-law, the Hon. Gilbert Neville Irby, to the use of her daughter Esme Irby during her life, with remainder to the use of her first and other sons successively according to seniority in tail male, with remainder to the use during her life of Esme Frances Sylvia Irby, the daughter of the said Esme Irby, with remainder to the use of the first and other sons of Esme Frances Sylvia Irby successively, according to seniority, in tail male, with remainder to the use of her first and other daughters successively, according to seniority, in tail male, with remainder to the use of the second and younger daughters of Esme Irby successively, according to seniority, in tail male, with remainder to the use during his life of the testatrix's nephew Bromley George Vere Way, with remainder to the use of his first and other sons successively, according to seniority, in tail male, with divers remainders over. The will contained a declaration that every estate for life should be without impeachment of waste. It also contained a direction to the executors out of her personal estate to make certain payments in the first, second, and third places respectively mentioned, and in the fourth place to pay, amongst other duties, all the estate duty on her freehold estates thereinbefore devised; and, subject to those payments, the testatrix bequeathed her residuary personal estate to Esme Irby.

The testatrix died on November 23, 1914, and her son-in-law, the Hon. Gilbert Neville Irby, subsequently assumed the name of

Smyth; his wife, the said Esme Irby, thereby becoming Mrs. Smyth, by which name she is referred to in this report.

After the testatrix's death several sales of timber were made by Mrs. Smyth, the tenant for life of the settled estates. In some cases the timber was sold together with the land on which it was standing, the proceeds of which were received by the trustees, and the duty thereon was duly accounted for by them. In other cases Mrs. Smyth cut and sold the timber apart from the land, the net proceeds of which amounted to 41*l.* 1*s.* 5*d.* She made further sales of the standing timber on certain other portions of the settled estates, and the proceeds of such sales, according to the valuations made for estate duty, amounted to 5882*l.* The proceeds of the felled timber were retained by Mrs. Smyth, estate duty at the rate of 19 per cent. having been assessed and paid on the sums of 41*l.* 1*s.* 5*d.* and 5882*l.*

An originating summons was taken out by the trustees of the will to which the following persons were made defendants—namely, Mrs. Smyth, the tenant for life in possession, without impeachment of waste, of the settled estates; Esme Frances Sylvia Irby, an infant, the first tenant for life in remainder expectant on the death of her mother, Mrs. Smyth, and failure of her male issue; Bromley George Vere Way, the second tenant for life in remainder subject to the prior limitations; and two persons who were legatees respectively under the will and a codicil of the testatrix.

The summons raised several questions, some of which had been determined by Eve J. on July 23, 1915. Of the remaining questions, the following only calls for a report—namely, whether the estate duty payable under s. 61, sub-s. 5, of the Finance (1909–10) Act, 1910, as amended by s. 9 of the Finance Act, 1912, on the net moneys received from sales of timber, whether cut by the defendant Mrs. Smyth and then sold or sold by her standing but apart from the land, ought to be paid by the trustees and charged against capital, or whether the same or any and what proportion thereof ought to be borne by the defendant Mrs. Smyth.

As it was decided on the hearing of the summons, amongst other things, that, on the construction of the will, the testatrix intended that the respective payments directed to be made out of personal estate should be made in the order of priority stated in the will, and as there was not sufficient personal estate remaining to provide the estate duty in question, which was directed to be paid in the fourth place, nothing turned on this particular direction in the will as to the incidence of this estate duty in respect of the timber, which fell, therefore, to be determined upon the construction of the Finance Acts and general principles.

Clayton, K.C., and *Howard Wright*, for the plaintiffs, stated the facts and the question to be determined.

Maugham, K.C., and *Vaisey*, for the defendant Mrs. Smyth. Sect. 9 of the Finance Act, 1912, only postpones the payment of the duty and does not alter or affect its incidence. Prima facie it must be borne by capital and not by the tenant for life, and this is not affected by the Acts. The only difference between the provisions on the subject, respectively contained in s. 61, sub-s. 5, of the Finance (1909–10) Act, 1910, and in s. 9 of the Finance Act, 1912, is that under the former there is to be aggregation for the purpose of fixing the value and the rate of duty, while under the later Act there is to be no aggregation. The Finance Act, 1896 (59 & 60 Vict. c. 28), s. 20, provides for the postponement of the payment of duty in respect of certain objects of national, scientific, or historic interest, and the persons there expressed to be accountable for the duty are the persons selling or for whose benefit the sale is made. It is significant that the draftsmen of the Acts of 1910 and 1912 have not used the same expression as that used in the Act of 1896, but have called the persons accountable "the owners or trustees of such land."

[SARGANT J. But the duty is payable on the net moneys which may from time to time be received from the sale.]

No. The section is only indicating the amount which is payable by the owners or trustees.

[SARGANT J. You pay that from time to time, and then when the rest is sold you have to pay under the proviso on the total prices received after deducting what has already been paid.]

Yes. That is only defining how much has to be paid.

Howard Wright, for the trustees, as representing the interests of all persons entitled in remainder. Sect. 9 of the Act of 1912 says the duty is to be "payable on the net moneys." The whole policy of the Finance Acts is to place the ultimate burden of the duty upon the person who takes the beneficial interest in the property that does not pass to the executor as such: s. 9 of the Finance Act, 1894; *In re Countess of Orford.* (1) The effect of the Finance statutes is that the duty is a charge on the property, which in this case consists of the net moneys arising from a sale of the timber, because s. 9 of the Act of 1912 expressly relieves the timber itself from the duty and throws it on the purchase-money. The question is, who is to pay the duty when the duty becomes payable? At that time you have the moneys received from the sale of the timber and a charge for duty on those moneys, and according to the principle of the Finance Acts the person who takes the benefit of the property is the person to pay the duty: *Berry* v. *Gaukroger.* (2)

Maugham, K.C., in reply. The Finance Act, 1912, is not for this purpose to be construed with the Act of 1894. There is no postponement of payment of the duty under the earlier Act: the duty under that Act was payable on the death.

[SARGANT J. The Act of 1910 must be construed with the Act of 1894. Sect. 61 is by way of modification of the earlier principal Act, and, when a particular section is altered in another Act, you must take it that the latter also refers to the principal Act.]

Part III. of the Act of 1910, including s. 61, is to be construed with the Act of 1894: see s. 96, sub-s. 3, of the Act of 1910; but the Act of 1912 is not to be so construed.

[SARGANT J. When you substitute one section for another, as s. 9 of the Act of 1912 is substituted for s. 61, sub-s. 5, of the Act of 1910, it must be the same in that case.]

Sect. 9 of the principal Act, that of 1894, does not apply to such a case as this. Timber is part of the land, and the land, so increased in value by the timber on it, is chargeable with the duty.

[SARGANT J. But here the tenant for life sells the timber as a separate asset.]

If the trustees are accountable and are entitled to get the duty out of the proceeds of the timber, a very difficult task is imposed on them.

[SARGANT J. That a tenant for life without impeachment of waste is for this purpose the owner is not an unnatural meaning to put upon the section.]

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(1) [1896] 1 Ch. 257.

(2) [1903] 2 Ch. 116.

Perhaps the Act of 1912 is an initiating statute and must be construed strictly. There is a distinction between "owners or trustees of such land," and the phrase which might have been used, "the owners or vendors of such timber." The persons originally chargeable remain chargeable. The incidence of the duty has not been altered, but it remains a charge on the land. Before the recent Acts the tenant for life not impeachable for waste took the proceeds of timber sold apart from the land, but he only paid the interest on the amount of the duty, which was a charge upon and came out of the land. These Acts do not purport to alter this incidence of the duty, but only provide for the postponement of payment.

[SARGANT J. But the Acts make the duty payable on the net proceeds of the timber as a separate property where the timber is sold apart from the land.]

If the contention of the remaindermen is right, instead of leaving the tenant for life only to bear the interest on the duty he is made to bear the whole of the duty. The expression "owners or trustees of such land" includes tenant for life and remaindermen, and if they are the persons to pay, then the tenant for life has only to bear the interest on the amount. Sect. 9, sub-s. 5, of the Finance Act, 1894, giving power to raise the duty by sale or mortgage or a terminable charge on the property, is not applicable to proceeds of sale of the timber.

[*Howard Wright* referred to s. 9 of the Act of 1894, which makes the duty a charge on the property in respect of which the duty is payable, and the definition of property in s. 22 including real and personal property and the proceeds of sale thereof respectively.]

Ingpen, K.C., and *Topham*, for the infant defendant Esme Frances Sylvia Smyth.

Luxmoore, for the remaining two defendants.

SARGANT J. Of the numerous puzzling questions I have had to decide in this case I think the one I have now to decide is the most puzzling; it is as to the incidence of postponed estate duty on the proceeds of sale of certain timber sold by the tenant for life. I had better preface what I have to say by stating that the provisions of the will as to the payment of the estate duty out of capital have no application at all, because, on the view I have taken as to the priority or non-priority of payment under the clause in question, it is clear that there will not be any money left to provide for the estate duty in question. Therefore I have to consider the incidence of the estate duty simply with reference to the devise made by the will and not with regard to the particular directions given as to the payment of estate duty. What the will has done has been to leave the property to a tenant for life, the defendant Mrs. Smyth, unimpeachable for waste, and she is entitled, therefore, to the proceeds of sale of all timber that she may sell apart from the land, although, of course, if the same timber were to be sold together with and as part of the land, she would only get the income of the aggregate proceeds.

The question arises under s. 9 of the Finance Act, 1912, which operates by way of substituting a provision in place of sub-s. 5 of s. 61 of the Finance (1909–10) Act, 1910. That Act has to be read together with, and as part of, the original Finance Act of 1894, and therefore, as a matter of construction, I must also read this substituted section together with and as part of the Act of 1894. That section provides as follows: [His Lordship read s. 9 of the Finance Act, 1912, and continued:] Mr. Maugham contends that there is no express intention to alter the incidence of estate duty; that, apart from this section, if the tenant for life subsequently had sold timber, the estate duty would have been charged originally on the full value of the land, including the value of the timber; and that, therefore, the tenant for life not impeachable for waste, when receiving the proceeds of the timber, would in fact only have had to pay interest on so much of the estate as represented the value of the timber; and I think that that is so.

On the other hand, Mr. Howard Wright says that under the express provisions of that section the estate duty is payable on the proceeds of sale of the timber, and, that being so, that s. 9 of the Act of 1894 applies, and the amount of the estate duty is to be a first charge on the property in respect of which it is leviable—that is, on the timber; for it is quite clear that it is in respect of the proceeds of sale of the timber that the estate duty is levied. And then Mr.

Howard Wright refers not only to s. 22, sub-s. 5, of the Act of 1894 as showing that property in that sub-section includes proceeds of sale, but he also refers to sub-s. 5 of s. 9 of the Act of 1894, which says: "A person authorised or required to pay the estate duty in respect of any property shall, for the purpose of paying the duty, or raising the amount of the duty when already paid, have power, whether the property is or is not vested in him, to raise the amount of such duty and any interest and expenses properly paid or incurred by him in respect thereof, by the sale or mortgage of or a terminable charge on that property or any part thereof." So that Mr. Howard Wright says that, even if under the express direction of s. 9 of the Act of 1912 the persons who are to bear the estate duty on the proceeds of sale should not be the tenant for life, but the total set of owners or trustees of the property, nevertheless they would only be the first hand to pay, and ultimately the duty would be thrown, as in the well-known case of *Berry* v. *Gaukroger* (1), on the persons by whom the benefit was ultimately derived from the property or assets in question.

I am not by any means clear that the expression "the owners or trustees of such land," which is a very general expression, might not include the tenant for life who had power to sell the timber and put the proceeds into her own pocket; but, however that may be, I think that the part of the section which directs who are in the first place to pay the amount of the duty, and on what they are to pay, cannot, in view of the provisions of the Finance Act, 1894, go further than stating or directing which is to be the first hand to pay, and does not affect the ultimate incidence of the duty. The duty is, on the plain terms of the Act of 1912, leviable on the proceeds of sale of the timber; and that being so, and the timber not passing to the executor as such, it appears to me that the estate duty is made a first charge upon those proceeds, and therefore necessarily falls upon the person who is entitled to the proceeds. And whether the first hand to pay should be the trustees representing the inheritance, or should be the tenant for life herself, an adjustment is provided for by s. 9, sub-s. 5, of the principal Act. I quite see that the result is to some extent anomalous; but, on the other hand, the whole position of a tenant

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(1) [1903] 2 Ch. 116.

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for life unimpeachable for waste with regard to timber is anomalous. If the tenant for life sells the timber separately, the tenant for life is entitled to the whole of the proceeds; if he sells it together with the estate, he only gets the income on the total price; and, inasmuch as here the new legislation seems to proceed by way of taxation of the proceeds of sale of the timber when sold separately as a separate item altogether, the result must be that at which I have arrived, although with a good deal of doubt and hesitation.

[It was ordered, therefore, that the estate duty payable under s. 61, sub-s. 5, of the Finance (1909–10) Act, 1910, as amended by s. 9 of the Finance Act, 1912, on moneys received by the defendant Mrs. Smyth from sales of timber actually severed from the settled land, whether cut by her and then sold or sold by her standing and then cut, ought not to be charged against or borne by the capital of the settled estates, but ought to be borne and paid by the said defendants.]

Solicitors: *Rider, Heaton, Meredith & Mills.*

F. E.

NEVILLE J.

1917

July 4, 5.

CORPORATION OF BRISTOL *v.* SINNOTT. (1)

[1917 B. 347.]

Local Government—Notice to Frontagers to make up a Road—Time Limit for Execution of Works—Common Form—Discretion of Local Authority—Unreasonable Time—Invalid Notice—Waiver—Estoppel —Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 150.

A local authority, when proceeding under s. 150 of the Public Health Act, 1875, to serve a notice on frontagers requiring them to execute certain works, must, in the exercise of their discretion, specify in the notice a reasonable time for that purpose, and if, acting bona fide and in the exercise of their discretion, they specify a time which proves to be insufficient the notice will nevertheless be good. But if, without exercising any discretion though acting bona fide, they specify a time which proves to be insufficient the notice will be bad, and if they execute the works they will be unable to recover the expenses from the frontagers, unless the frontagers have waived the invalidity of the notice or so acted as to estop themselves from objecting to the notice.

Where, therefore, a local authority, whose practice was to specify one month in their notices as a common form, served a notice under the section on frontagers requiring them to do certain works "within one calendar month from the date of the service thereof," without having exercised any discretion whatever in considering what was a reasonable time to allow for the execution of the works, and the frontagers did not commence the works nor object to the validity of the notice, and after three months the local authority, without the consent of the frontagers, began the works and completed them in about four months, and after demand sued the frontagers for the expenses incurred in doing the works:—

Held, that the notice was bad in not specifying a reasonable time for the execution of the works, and that the local authority could not recover the expenses from the frontagers.

Held, also, that the frontagers in standing by and doing nothing had not waived their rights under the section nor estopped themselves from objecting that the notice was bad.

Farnworth Local Board v. *Compton* (1886) 34 W. R. 334 explained on the question of waiver.

ADJOURNED SUMMONS.

The plaintiffs were the urban sanitary authority for their district, and the defendants were the owners of land abutting for some distance on a road, called Bloomfield Road, in the plaintiffs' district. The road was not a highway repairable by the inhabitants at large.

(1) Affirmed on appeal, October 23, 1917.

The defendants' land was building land, but no buildings had as yet been erected upon it.

On March 10, 1914, the engineer of the plaintiffs, in pursuance of a resolution of the council, served on the defendants and the other owners of premises fronting Bloomfield Road a notice under s. 150 of the Public Health Act, 1875, requiring them "within one calendar month from the date of the service thereof" to execute certain works of sewering, and so on—following the terms of the section—for the purpose of making up the road.

After service of the notice correspondence ensued between the defendant G. H. Sinnott (who was a solicitor), acting on behalf of his co-defendant and himself, and the plaintiffs in which objection was taken to the works as unnecessary, but it was suggested that if the corporation would purchase part of the defendants' land for a public recreation ground they would acquiesce in the notice. The negotiations fell through. The defendants did not commence the works nor intimate any intention of doing so, and on May 29, 1914, the plaintiffs gave the defendants notice that they would do the works themselves, and on June 8, 1914, they commenced them and completed them in the following October. In the meantime on June 27, 1914, the defendants wrote the plaintiffs stating that they did not acquiesce in or consent to the plaintiffs doing the works at their expense. In December, 1914, the surveyor of the plaintiffs duly apportioned the expenses incurred by them in executing the works amongst the several frontagers, and the sum apportioned to the defendants amounted to 1415*l.* 19*s.* 1*d.* Notice of the apportionment was duly served on the defendants on January 7, 1915, and they did not at any time dispute its accuracy.

On June 15, 1915, the plaintiffs served on the defendants the usual demand for payment of the 1415*l.* 19*s.* 1*d.*, and thereupon the defendants on July 5, 1915, presented a memorial to the Local Government Board under s. 268 of the Act appealing against the apportionment on the ground (amongst others) that the notice of March 10, 1914, requiring them to execute the works within one month was unreasonable and bad, having regard to the fact that the corporation were unable to do the works themselves under four months. The Board held an inquiry, at which the defendants were represented by counsel, and eventually intimated that they were prepared to make an order confirming the apportionment. Thereupon the defendants withdrew their memorial with the approval of the Board.

The defendants not having complied with the demand of June 15, 1915, the plaintiffs on February 8, 1917, issued a summons against them to obtain the usual declaration that the 1415*l.* 19*s.* 1*d.* was a charge on the land and for consequential relief. The defendants relied on the objection they had raised to the validity of the notice of March 10, 1914. The town clerk of the plaintiffs deposed: "It is common for local authorities, and has been the practice of the plaintiffs, to insert in such notices as that of March 10, 1914, 'one month' as a period in which the works are to be executed. It is well recognized by owners on whom such notices are served that such period is named more with the object of affording them a reasonable time in which to make up their minds whether to do the works themselves or (as usually happens) to leave them to be done by the local authority, than as rigidly fixing a time within which the works must be actually completed, and that considerable latitude is always allowed for the actual completion of the works in cases where the owners elect to do the works themselves." The defendant G. H. Sinnott denied any knowledge of the alleged practice deposed to by the town clerk.

The plaintiffs had not adopted the Public Health Acts Amendment Act, 1890.

Macmorran, K.C., and *Northcote*, for the plaintiffs. Under s. 150 it is left to the local authority to specify the time for the completion of the works, and if they act mala fide the notice would no doubt be bad. But so long as they act in good faith the time limit is not material, because in ninety-nine cases out of a hundred the frontagers leave it to the local authority to do the works, but it is admitted that if frontagers commence to do the works before the local authority intervenes they are entitled to a reasonable opportunity to complete the works, and the local authority cannot interfere: *Denman* v. *Finchley Urban Council.* (1) Here on our evidence the time limit of one month was a common form and sufficient to enable the defendants to decide whether they would

(1) (1912) 76 J. P. 405.

do the works themselves, and if they had commenced the works at any time before the corporation began them every reasonable opportunity would have been given them to complete the works, so that the time limit of one month was really immaterial. But the defendants did nothing and at no time intimated any intention of doing the works, and it was not until after the expiration of three months from the date of the notice that the plaintiffs commenced the works, and it is submitted that it is not open to the defendants after completion of the works to object that the time was unreasonable and insufficient. Under s. 23 of the Act, which requires a reasonable time to be specified for the construction of drainage works, it has been held that an owner may waive the requirements of the section: *Hall* v. *Batley Corporation* (1); and it is submitted that the same principle applies to s. 150. Here from first to last the defendants raised no objection to the time limit until they presented their memorial to the Local Government Board. Their principal complaint was that it was a hardship on them to find such a large sum of money, and it is submitted that by their acts and conduct they have waived the requirements of the section and estopped themselves from now objecting to the validity of the notice.

G. C. Kingsbury, for the defendants. Sect. 150 empowers a local authority to impose an obligation on frontagers. It is in a sense a penal enactment and must be construed strictly against the local authority. Here the notice required the defendants, who are trustees under a will, to expend a considerable sum in making up a road that runs for some distance through their land and to complete the works within a time that was obviously unreasonable and wholly inadequate for the purpose. The corporation on their own evidence never exercised any discretion in the matter nor considered what was a reasonable time for completion of the works, but simply put in one month as a matter of form. The notice is therefore bad, and the defendants are not "in default" within the meaning of the section. In *Hornsey Corporation* v. *Kershaw* (2), which was a decision at Middlesex Quarter Sessions under s. 41 of the Act, it was held that a notice to do works within seven days was unreasonable and therefore invalid. Further, service of a proper notice

(1) (1877) 42 J. P. 151.

(2) (1909) 73 J. P. 335.

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cannot be waived: *Farnworth Local Board* v. *Compton.* (1) In that case the notice had not been served and the former owner had paid an instalment of the expenses, and Lord Esher says: "The doctrine of waiver cannot be brought forward unless the omission is assumed of something that might be waived. Therefore, assuming that the notice was not given, the payment or receipt in respect of the instalments could not be a waiver, for there was nothing to waive. The giving the notice was a condition precedent, and the defendants could not have waived something in a matter in respect of which they were not liable at all." But if a frontager can waive the requirements of the section, it is submitted on the evidence that the defendants have not waived their rights nor estopped themselves from objecting that the time limited was unreasonable.

Macmorran, K.C., in reply. In *Farnworth Local Board* v. *Compton* (1) the point of the case was that the notice had not been served and there had been a change of ownership, and there was no evidence that the notice had been waived by the original owner. It does not decide that there can be no waiver of the requirements of the section. The only sections of the Act which require "a reasonable time" to be specified are the 23rd, the 36th, and the 41st, and it is submitted that the principle of those sections does not apply to ss. 38, 46, 62, 81, 94, 120, and 150, which only require "a time to be specified" in the notice, and that if a notice under the latter sections is good on the face of it the Court will not go behind it and inquire into the sufficiency of the time. In *Thomas* v. *Western Steam Trawling Co.* (2), a decision under s. 94, a notice to abate a nuisance "forthwith" was held to be sufficient. It does not follow that because the corporation took four months to do the works a contractor would not have done them in a month. When the time limit in a contract is short it is generally met by putting on a number of men to do the work. Lastly, the objection should have been taken promptly, but if a man stands by and does nothing and raises no objection to the validity of the notice until after the works have been completed by the local authority, that, it is submitted, amounts to a waiver by him of the condition as to the time specified in the notice, and it is then too late to object that the time specified was unreasonable.

(1) 34 W. R. 334, 335.

(2) (1894) 59 J. P. 232.

NEVILLE J. The question I have to decide here is purely technical, and turns on the construction of a few words in s. 150 of the Public Health Act, 1875. Whether the corporation were hard on the owners or whether the owners were attempting to evade a proper responsibility is a matter with which I have nothing to do. I have simply to ascertain whether the notice given in this case was, within the meaning of the section, a good notice. The section provides that where a street is not sewered, and so on, to the satisfaction of the urban authority notice may be given to the owners of the premises "adjoining or abutting on such parts thereof as may require to be sewered," and so on, requiring them "to sewer level pave metal flag channel or make good, or to provide proper means for lighting the same within a time to be specified in such notice." Now what does that mean? I think it means, what is expressed in several of the other sections in the Act where work has to be done on notice, that a reasonable time is to be specified, that is, a time reasonably adapted for the purpose of executing the works notice to do which has been given by the local authority; and what may or may not be a reasonable time is, I think, within the discretion of the local authority. I feel satisfied that if a local authority, having considered the time necessary for doing the works, fixed a certain time which proved to be too short, it would be idle for the owner to come to the Court and say "The time was not long enough and the discretion was improperly exercised." I think that is a matter entirely for the local authority. But the peculiarity of the present case is this, as appears quite clearly from the evidence, that the local authority, instead of exercising their discretion and considering what was a reasonable time for the execution of the works notice to perform which they gave, had got into the habit of specifying one month, and they said—and I think very truly said—that it was really a matter of very small importance, because if the works were commenced within a month—and a month was plenty of time to allow a man to commence—they never were unreasonable as to the time which they allowed the owner or owners to finish the works. Further, it has been held by Joyce J. in *Denman* v. *Finchley Urban Council* (1) that the proper construction of the Act is that if the works have been commenced by the owner before the local authority intervene no advantage can be taken by the local authority if they are not finished within the time specified, if a reasonable effort is being made to fulfil the obligation of the owner. Consequently, I think the argument for the local authority is right that it is a matter of very small moment to the frontagers what time is fixed in the notice so long as at all events it is a time sufficiently long to provide for the commencement of the works. But I do not think that I am entitled to take that into consideration, because we are dealing here with a statute which imposes an obligation on the owners and imposes that obligation only upon the fulfilment of certain conditions precedent on the part of the local authority. One of those conditions precedent is to serve such a notice as is specified in s. 150, and that includes stating a time for the completion of the works, and on the best construction I can give to the section that means, in my opinion, a reasonable time. It appears to me, therefore, that, if a reasonable time has not been fixed for the completion of the works within the meaning of the section, the notice is bad, because the notice which the Act requires to be given has not in fact been given. I see no distinction between not giving a notice at all and giving a notice that does not fulfil the requirements of the section. I think the evidence clearly supports what I have said, and it is quite right that it should, because in a case like this I am sure the local authority would wish the facts to be fairly presented to the Court and would not wish it to be thought that they had intended to exercise a discretion which they did not exercise at all. Do not let it be understood that I am throwing blame on the character of the evidence which has been put before me. I think it was very properly put forward, but it is perfectly obvious that the month was fixed without reference to a reasonable time for the completion of the works, and that the time specified was grossly insufficient for the purpose, and I do not think it is really any answer to say, "Oh, but if you had put on crowds of workmen to work day and night you could do it in a very short time." There would be nothing reasonable in fixing a time in which the works could only be done by the use of exceptional means to carry them out. I come to the conclusion therefore in this case that the notice was bad inasmuch as it fixed a time for the completion of the works within which they could not reasonably be completed, not because the discretion had been mistakenly exercised, but because no discretion had been exercised at all, and the local authority, without considering what time was necessary for the completion of the works, simply put in the common form time of one month, which they had got into the habit of putting in all notices. I do not think that satisfies the provisions of the section at all. That being so, the local authority cannot recover unless there has been a waiver of the right to the notice specified in s. 150, or the conduct of the defendants has been such as to estop them from saying that a good notice has not been served.

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(1) 76 J. P. 405.

With regard to the case of *Farnworth Local Board* v. *Compton* (1), in which the notice had not been served, it appears to me that the judgment of Lord Esher is inaccurately reported. He seems to indicate that the notice is something which cannot be waived by the owner—is something unwaivable. But the judgment of Lindley L.J., as he then was, shows that the decision in the case was simply this, that the payment by the former owner of part of the amount due for the execution of the works did not amount to a waiver of the notice, the evidence being wholly insufficient to show that there was any intention on his part to waive his right to the notice. It appears to me clear that where a provision like this is put in the statute for the protection of the public, a member of the public who has no desire to rely on the protection given him has a perfect right to waive the giving of the notice altogether. I cannot conceive anything that should stand in the way of his doing so if there was evidence to show that he so wished. But I do not find in the present case any evidence upon which I could hold that there has been a waiver by the defendants of their right to the notice. There was some hostility in their attitude from the first, and it would be contrary to the facts if I found that there was any intention on their part to waive any imperfection in the notice that was served upon them. They from the first stood off, but negotiated with the corporation to see if mutual terms could be arrived at satisfactory to both parties. But for the negotiations, which fell through, I think the corporation were held at arm's length from first to last. That being so, it seems to me impossible to find that there was any waiver in the present case. To my mind waiver depends upon intention, and one is very apt to confuse the difference between waiver and estoppel. Waiver is the result of the intentional action of the person waiving. Estoppel, on the other hand, is the result of conduct on his part which induces the law to say " You shall not be heard to state the truth inasmuch as you have led others to suppose that that is true which you now say is untrue." That brings me to the question whether there is anything in the evidence which enables me to say that there is estoppel against the defendants in the present case. There again I do not think so. I think that throughout, as I have said, they challenged the corporation and held them at arm's length, and that the letter of June 27 written to the corporation a little time after they commenced the works is quite inconsistent with any idea of any estoppel arising against them through their having misled the corporation into a view of facts which they knew to be untrue and which they led the corporation to suppose to be true.

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(1) 34 W. R. 334.

The conclusion I come to, therefore, is that, a good notice not having been given, it is not within the jurisdiction of the Court to say that it is a small matter, and that the requirements of the Act, had they been fulfilled, would not have substantially put the defendants in any better position, and therefore it is immaterial. I think that in the case of a statute like this the Court must apply itself only to the question whether the condition precedent has been fulfilled, and not whether it was a wise or foolish condition or an important or unimportant condition. I know of no jurisdiction that the Court has to override the enactments of an Act of Parliament. I hold, therefore, that the summons must be dismissed with costs.

Solicitors for corporation: *Robins, Hay & Co., for E. J. Taylor, Bristol.*

Solicitors for defendants: *Lowndes & Co., for G. H. Sinnott, Bristol.*

H. L. F.

In re COPAL VARNISH COMPANY, LIMITED.

EVE J.

1917

July 19.

[1917 C. 1212.]

Company—Directors—Transfer of Shares—Restrictions on Transfer—Refusal of one Director to attend Directors' Meeting—Inability to obtain Quorum—Rectification of Register of Members—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 32.

A shareholder, whether in a public or in a private company, has a property in his shares which he has a right to dispose of, subject only to any express restrictions which may be found in the articles of association of the company.

The law stated in *In re Bede Steam Shipping Co.* [1917] 1 Ch. 123 is applicable as well to shares in a private as to shares in a public company.

The articles of association of a private company provided that no share should be transferred to any person not already a member without the consent of the directors. There were two directors only, E. and P., E. being the chairman and having in that character a casting vote. The quorum necessary for the transaction of business was two. E., without first having obtained the consent of the board, executed transfers of some of his shares to persons not already members of the company and sent the transfers to the company for registration. P. purposely refused to attend board meetings summoned to consider the transfers in order to prevent a quorum being formed. On an application by the transferees under s. 32 of the Companies (Consolidation) Act, 1908 :—

Held, that the articles did not require the directors' consent to be obtained before the execution of the transfers and that the transfers therefore were not inoperative documents, though they had no legal effect till the consent of the directors had been obtained and registration effected.

Held, also, that P. could not by wilfully refusing to attend board meetings prevent the transfers from being registered, and that the transferees under the circumstances were entitled to an order directing the company to register the transfers.

Originating Motion under s. 32 of the Companies (Consolidation) Act, 1908.

The company was incorporated in 1883 for the purpose of carrying on the business of manufacturing copal varnish. The present issued share capital consisted of 60 ordinary shares of 10*l.* each, of which 28 were registered in the name of Ernest Randall, 28 in the name of his brother Percy Randall, and the four remaining shares in the names of four other persons. In addition there were 541 preference shares of 10*l.* each, of which 105 were registered in the name of Ernest Randall, 105 in the name of Percy Randall, and the remaining 331 in the joint names of Ernest Randall and Percy Randall, being held by them on certain trusts in favour of their sisters. The name of Ernest Randall standing first on the register, he had, under the articles of association, the sole voting power in respect of these shares. By the articles every member was entitled to one vote for every share held by him.

In 1908 the company was by special resolution converted into a private company under the provisions of the Companies Act, 1907. The articles of association further provided:

15. "The person or persons for the time being registered as the owner or owners of any shares may (subject to the regulations of the company) transfer the same to any person not being an infant, a lunatic, or by marriage or otherwise under any legal disability."

17. "The directors may decline to register any transfer of shares made by any person who is indebted to the company for any money then due and payable or who may be solely or jointly liable to it for any call whether payable or not or any interest thereon or in respect of any debt notwithstanding that the same may not then be due, or where the proposed transferee is a person engaged in business of a similar character to the business of the company or who may otherwise be a competitor in trade with the company, or in any case where the directors shall consider the proposed transfer will not be conducive to the interest of the company."

On the occasion of the company being turned into a private company the following words were by special resolution added to article 17, namely: "No share shall be transferred to any person who is not already a member of the company without the consent of the directors."

Article 28 provided that "the number of directors shall not be less than two or more than seven."

Clause 8 of Table A in the First Schedule to the Companies Act, 1862, which was incorporated in the regulations of the company, provides: "The instrument of transfer of any share in the company shall be executed both by the transferor and transferee, and the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof."

Clause 66 of Table A, which was similarly incorporated, provides: "The directors may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business: questions arising at any meeting shall be decided by a majority of votes: in case of an equality of votes the chairman shall have a second or casting vote: a director may at any time summon a meeting of the directors."

There were only two directors, Ernest Randall and Percy Randall, and the quorum of directors was two. Ernest Randall was, as the Court decided, chairman of the directors. Ernest Randall, without first obtaining the consent of the board of directors, executed transfers of twelve of his shares to twelve persons who were not members of the company. These transfers were sent to the company for registration, and a meeting of the directors was summoned by a notice stating, among the agenda, "transfer of shares." After the meeting had been postponed to meet the convenience of Percy Randall he wrote to the secretary of the company that, having regard to the addition made by special resolution to article 17, he was "advised that the transfers of shares of which notice has been given to you are invalid, as the consents of the directors have not been obtained. As that is the only business on the agenda for the" adjourned meeting "I do not propose to attend." This refusal was subsequently persisted in by Percy Randall's solicitors.

This was an originating motion by the transferees against the company, under s. 32 of the Companies (Consolidation) Act, 1908, for rectification of the register of members by inserting their names as holders of the shares in the place of the name of Ernest Randall. Percy Randall, at his own request, was joined as a respondent to the motion.

There was some conflict of evidence as to what took place at a meeting of the directors summoned for June 27, 1917, at which Percy Randall was alleged to have disputed the right of Ernest Randall to act as chairman and to have refused to vote on the matter of the proposed transfers; but on the hearing of this motion an offer was made that the motion should be adjourned to give Percy

Randall an opportunity to attend a meeting for the consideration of the transfers, and this offer was refused on his behalf.

Maugham, K.C., and *Frank Evans*, for the motion. The consent required by article 17 is the consent of the directors sitting as a board, on which, in the present state of things, Ernest Randall has a casting vote. That state of things does not justify Percy Randall in refusing to attend board meetings in order to prevent a quorum being formed. The attitude which he has taken up, and which he still persists in, is that the consent of the directors to accept any proposed transferee must be obtained before the execution of the transfer, but that is not the meaning of article 17, under which it is quite immaterial whether a transfer is first executed and then sent in for registration, or whether the consent of the directors is obtained before execution of the transfer. Shares in a company are property of which the shareholder is at liberty to dispose subject only to any express restrictions contained in the articles: *In re Bede Steam Shipping Co.* (1), per Lord Cozens-Hardy M.R. In any case, the transfers when laid before the board would amount to a request to the directors to give their consent.

Clayton, K.C., and *Whinney*, for Percy Randall. Having regard to article 17, we submit that a transfer executed without the previous consent of the directors is a nullity, and that, the transfers in question being invalid on this ground, Percy Randall was under no obligation to attend the board meeting. The consent of the directors, if given after the execution of the instruments, could only operate by way of ratification, and would not amount to the antecedent consent required by the article. In *In re Bede Steam Shipping Co.* (1) Lord Cozens-Hardy M.R. was dealing with the position of a shareholder in a public company. The position of a shareholder in a private company, where the restriction of the right of transfer is a necessary part of the constitution of the company, is different, and the restriction contained in article 17 means more than a mere power in the directors to refuse their consent and makes the consent of the directors a condition precedent to the whole transaction. That construction was placed on a covenant by a lessee not to assign without the lessor's consent in *Barrow* v. *Isaacs & Son* (2),

(1) [1917] 1 Ch. 123, 132.

(2) [1891] 1 Q. B. 417.

and in *Gilbey* v. *Rush* (1) Kekewich J. expressed his opinion that the trustees' consent to the sale or lease of the principal mansion-house under the Settled Land Act, 1890, s. 10, sub-s. 2, must be a consent given at the time and that nothing retrospective would do. Those cases are analogous to the present case, and, the previous consent of the directors not having been obtained, this application is made by persons who have no right to be placed on the register.

Percy Wheeler, for the company, took no part in the argument.

Eve J. In my opinion there is no answer to this motion. [His Lordship referred shortly to the facts, saying that he was satisfied that Ernest Randall was and had always been recognized by Percy Randall as chairman, and that the refusal by Percy Randall of the offer made at the Bar that the motion should stand over in order to enable him to attend a meeting of the board confirmed the conclusion which he had come to on the evidence that Percy Randall purposely kept away from the meetings which had been summoned in order to prevent a quorum being present for the transaction of business, and continued :] The only point which I have to consider is what are the legal rights of the persons who are now applying to have the register rectified. In order that there may be no doubt as to the standpoint from which I approach this question, I wish to say that, alike in a public and a private company, a shareholder has in my opinion, to use the language of Lord Cozens-Hardy M.R. in *In re Bede Steam Shipping Co.* (2), " a property in his shares, a property which he is at liberty to dispose of, subject only to any express restriction which may be found in the articles of association of the company." That statement is, I think, as applicable to a private company as to a public one, subject only to this observation, that, whereas in a public company it is not necessary that there should be any agreement inter socios operating as a restriction of the right of transfer, in the constitution of a private company some restriction must be found. It follows that in the present case Ernest Randall had a property in his shares of which he had a right to dispose subject only to any express restriction in the articles of association. Those express restrictions are to be found in article 17 as amended by the special resolution passed in June,

(1) [1906] 1 Ch. 11, 22.
(2) [1917] 1 Ch. 132.

1908. It is not suggested that article 17 as it stood prior to that amendment would operate in any way so as to prevent the registration of the transfers now in question, but it is said that the addition to the article that "No share shall be transferred to any person who is not already a member of the company without the consent of the directors" imposes upon an intending vendor of shares an obligation to obtain the consent of the directors to the reception into the company of the proposed purchaser before he can proceed with the transaction to the point of executing the transfer, and *Barrow* v. *Isaacs & Son* (1) and *Gilbey* v. *Rush* (2) were cited in support of that contention. I think this argument loses sight altogether of the essential difference between the nature of the transactions under consideration in those cases and the successive steps which it is necessary to take in order to bring about a final and effectual transfer of a share. The execution of the transfer of a share has no such immediate effect as was brought about by the execution of the assignment in *Barrow* v. *Isaacs & Son.* (1) The operation of legally transferring a share is indeed one of some complexity. In the first place there is the contract of sale followed by the execution of an instrument of transfer containing an agreement by the purchaser to accept the shares subject to the several conditions on which the vendor held the same immediately prior to the execution of the transfer—that is to say, subject, amongst other things, to the conditions imposing restrictions on the vendor's right to transfer to that particular purchaser. Up to this point all that has been done is to pass an equitable interest in the shares to the transferee. There has been no legal assignment completed; indeed, the most crucial point in the transaction has not been reached—the acceptance of the transfer by the board of directors and the passing of it for registration; and even then the matter is not completed, because until the actual entry of the name of the transferee on the register the transferor remains the legal holder of the share. Such being the successive operations by which alone a legal transfer can be effectuated, what is there in the wording of the clause to which I have referred which imposes upon an intending transferor any obligation to approach the directors and ask them if they will

(1) [1891] 1 Q. B. 417.

(2) [1906] 1 Ch. 11.

approve of an intended transferee before executing the document, which is only one of the series of operations, and creates no title in the transferee of which the company can take any note until the directors have sanctioned its registration? I cannot see anything in the article which imposes any such obligation, and I think it would be an unreasonable construction to hold that there is any obligation to apply for the consent before the transfer is tendered for acceptance and registration. So long as prior to the completion of the transaction an opportunity is given to the directors sitting as a board to determine whether the proposed transferee is a person whom they are prepared to admit as a member of the company, the conditions imposed by the article are, in my opinion, complied with, and the contract into which the vendor on becoming a shareholder entered with his co-shareholders is sufficiently discharged. The argument that if the directors only give their consent after the vendor has purported to transfer the shares, that is ratification by the directors and not the antecedent consent on their part contemplated by the article, is based upon an exaggerated estimate of the instrument of transfer; its efficacy depends solely on the question of its registration, and it is for the directors, by giving or withholding their consent to this, to determine whether the whole transaction is to be effective or not.

In my opinion Percy Randall has taken up an attitude in this dispute which is untenable, and, bearing in mind that he was added as a party to this motion at his own request, in making an order directing the company to rectify the register by giving effect to these transfers I must at the same time order him to pay the costs of the motion.

Solicitors: *Francis Miller & Steele; Lewin, Gregory & Anderson; E. S. M. Perowne.*

A. C.

C. A.

1917

June 27, 28.

CHAPRONIERE *v.* LAMBERT.

[1916 C. 1288.]

Specific Performance—Parol Agreement for Lease—Rent in Advance—Part Performance—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

Payment of rent in advance in respect of a parol agreement for a lease of premises of which the lessee has not taken possession is not such part performance as will take the case out of the operation of s. 4 of the Statute of Frauds.

Thursby v. *Eccles* (1900) 49 W. R. 281 approved and followed.

Application of the doctrine of part performance to parol contracts observed upon.

Decision of Eve J. affirmed.

Appeal from a decision of Eve J.

The action was brought by the plaintiff for specific performance of an alleged agreement by the defendant to grant to the plaintiff a lease of a farm known as "Limbourne," Mundon, in the county of Essex.

The plaintiff's case was that at an interview between the plaintiff and defendant on April 22, 1915, the defendant wrote out, at the plaintiff's request, a memorandum which contained the terms of the verbal agreement at which they had arrived, and that the plaintiff thereupon made a copy of it. The memorandum was in the following terms: "Agreement for lease for 3, 7, 14 at 90*l.* per annum, with freehold at 2100*l.* within three years from date. Agreement 24th June, 1916: Certain fixtures to be taken and agreed hereafter. Payment to be on the usual quarter days." The memorandum was not signed by either party and did not contain the name either of the proposed lessor or lessee.

At the same interview the plaintiff paid the defendant a sum of 25*l.*, being, as he alleged, 22*l.* 10*s.* in respect of rent in advance and 2*l.* 10*s.* in part payment for certain fixtures, and was handed a receipt for it in the following form: "22nd April, 1916. Received from Lieut. R. Chaproniere the sum of twenty-five pounds —— shillings and —— pence, being payment of one quarter's rent due 29th September, 1916, for premises situate Limbourne, Mundon. 25*l.* (Signed) W. P. Lambert."

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The plaintiff contended that these two documents constituted a sufficient memorandum of the agreement to satisfy the Statute of Frauds, and in the alternative he relied on the payment of the 25*l.* for rent in advance as constituting part performance of the agreement. The defendant, on the other hand, denied that at any time he made any agreement with the plaintiff, and alleged that there had been no part performance by the plaintiff or by the defendant of any agreement between them ; that no memorandum of any terms of agreement between the plaintiff and defendant was written by the defendant, and that the Statute of Frauds had not been complied with.

Eve J. held that, accepting the plaintiff's account of the transaction as correct, there was nothing in the receipt signed by the defendant to connect it with the memorandum, or anything which was indicative even of the existence of a contract for a lease. It was a bare receipt for the sum of 25*l.* rent paid in advance, and in those circumstances he could not bring himself to the conclusion that he would be determining the question in accordance with the authorities if he were to hold that there was such a connection between the two documents as bound him to read them as one. As regarded the alleged act of part performance, he felt himself precluded by the decision of Bigham J. in *Thursby* v. *Eccles* (1) from holding that the payment of the rent in advance on a parol agreement was such part performance as would take the case out of s. 4 of the Statute of Frauds.

The plaintiff appealed.

The only point on which a report is called for is as to whether the payment of the 25*l.* constituted such part performance of the agreement as to take the case out of the statute. The argument as to the sufficiency of the memorandum is therefore omitted.

Cox-Sinclair and *W. A. Wardley*, for the appellant. It is submitted that the payment of rent in advance is in itself sufficient part performance to take the case out of the statute. Payment of rent constitutes the relationship of landlord and tenant, which is a continuous relationship, and differs in that respect from the relationship of vendor and purchaser, which ceases immediately on the completion of the purchase. The only case on the present point is *Thursby* v. *Eccles* (1), which, it is submitted, was wrongly decided.

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(1) 49 W. R. 281.

[SWINFEN EADY L.J. I could follow your argument if the appellant had entered into possession and paid rent. What is the strongest case in your favour ?]

Miller & Aldworth, Ld. v. *Sharp.* (2) There a landlord having verbally agreed with his yearly tenants to grant them a lease for twenty-one years of the premises, held by them at an increased rent, the tenants for some time afterwards paid the increased rent, and it was held by Byrne J. that the payment of rent was a sufficient part performance to take the case out of the statute. It is true that in that case the tenants were in possession, but Byrne J. based his decision on the payment of the increased rent. The Courts have held that in such a case possession is an equivocal act and may be referable either to the old or the new tenancy. That case was not cited in *Thursby* v. *Eccles.* (1)

Nunn v. *Fabian* (3), which was cited in *Thursby* v. *Eccles* (1), is relied upon for the observations of Lord Cranworth as supporting the present contention. In the two other cases cited in *Thursby* v. *Eccles* (1) there was neither payment of rent nor possession. *Nunn* v. *Fabian* (3) was also considered in *Humphreys* v. *Green* (4) and in *Miller & Aldworth, Ld.* v. *Sharp.* (2) It is submitted, therefore, that the mere payment of the rent by the plaintiff gave him an equitable right to an agreement for a lease; that all he had to do was to show some act referable only to some tenancy, and that he could then give parol evidence as to the terms of the agreement.

[SWINFEN EADY L.J. What is the plaintiff's equity ? Mere payment of money is not sufficient. He is entitled to have it back.]

It is submitted that payment of rent is a clear and unequivocal act referable only to a tenancy, and is such part performance as entitles the plaintiff to prove a parol agreement.

Micklem, K.C., and *Johnston Edwards*, for the respondent, were not called upon.

SWINFEN EADY L.J. stated the facts, and held that there was no sufficient memorandum of the agreement to satisfy the statute.

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(1) 49 W. R. 281.

(2) [1899] 1 Ch. 622.

(3) (1865) L. R. 1 Ch. 35.

(4) (1882) 10 Q. B. D. 148, 156.

He continued : Then it is said that at all events there has been a payment of 25*l*. for rent in advance and that that amounts to part performance of the contract. In my opinion the mere payment of rent in advance is not such a part performance as to take the case out of the statute. Even in the case of a sale of land the payment of the whole of the purchase-money would not of itself be sufficient to do so. It must be remembered that the ground upon which a Court of Equity enforces specific performance of a contract affecting land is that the person to be charged is charged, not upon the contract itself, but upon the equities arising out of the changed position caused by the acts of the parties done in execution of the contract. Thus in *Maddison* v. *Alderson* (1), where the whole law on the subject was dealt with fully, Lord Selborne said : " In a suit founded on such part performance, the defendant is really ' charged ' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself." And later on (2) : " It is not enough that an act done should be a condition of, or good consideration for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject-matter of the contract." It is clear that the mere payment of money does not change the relative positions of the parties though it may give rise to a claim to recover it back. Then Lord Blackburn in the same case (3), although reluctantly accepting the position, and treating it as anomalous, that delivery of possession of lands will take the case out of the statute, said : " If it was originally an error it is now I think communis error and so makes the law." And a little later he added : " But I do not think this anomaly should be extended ; and it is not a little remarkable that there is no case, at least none was cited, and I have found none, in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the possession." Here there is nothing of that sort.

Then the case of *Nunn* v. *Fabian* (4) was relied on by the plaintiff,

(1) (1883) 8 App. Cas. 467, 475.
(2) Ibid. 478.
(3) 8 App. Cas. 489.
(4) L. R. 1 Ch. 35.

but there, in addition to paying an increased rent, the tenant, who was in possession, had spent a considerable sum on the alteration of the premises. That case does not, therefore, assist the plaintiff.

In the case of *Thursby* v. *Eccles* (1) Bigham J. in terms decided this very point. He there held that payment of rent in advance on a parol agreement for a lease of a house was not of itself such a part performance as would take the case out of s. 4 of the Statute of Frauds. In so deciding he said : " When the Court of Chancery gives relief from the operation of the statute it does so upon the equities which have arisen out of the acts of the parties. Payment of money in such a case as this raises no equity except possibly a right to recover it back." In my opinion that case was well decided.

In the present case there is no sufficient memorandum or note of the agreement, and nothing which can be relied upon as part performance raising an equity upon which the defendant can be charged. In my opinion, therefore, the appeal fails.

Bankes L.J. I agree. I do not think I can usefully add anything. My view may be summarized in this way: It is really impossible to contend successfully that there is any material here by which the two documents can be connected together, and I think that the point as to part performance is not open to the plaintiff on the authorities.

Warrington L.J. I am of the same opinion. I only desire to say a few words on the application of the doctrine of part performance to parol contracts, because it is a question of some general importance. We are asked to overrule a decision of Bigham J. in *Thursby* v. *Eccles* (1) and impliedly to overrule a whole series of authorities, including *Maddison* v. *Alderson* (2), by which it has been well settled that the mere payment of purchase-money is not a sufficient act of part performance to enable the Court to enforce specific performance of a contract. It is desirable to see on what ground the doctrine rests under which Courts of Equity enforce specific performance of parol contracts for the sale and leasing of land notwithstanding the Statute of Frauds. There is no question but that a decree in such a case would not have the effect of charging the defendant on the contract itself, but only—to use the words of Lord Selborne in *Maddison* v. *Alderson* (1)—of charging him " upon the equities resulting from the acts done in execution of the contract."

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(1) 49 W. R. 281, 282.

(2) 8 App. Cas. 467.

The matter is very well summed up in Fry on Specific Performance, 5th ed. p. 283, in the following passage: " Courts of Equity hold that, notwithstanding the express language of the statute, a case may be taken out of its operation by any one of the following circumstances "—then omitting circumstances (1.), (2.), and (3.), which are not material to the present case—" (4.) by a parol contract and part performance, which is, as we shall see, but a particular case of fraud." And then on p. 290 the learned author, after stating that the part performance of a contract by one of the parties to it may in equity exclude the statute, continues: " This exception seems to be based on the view that if a man have made a bargain with another, and allowed that other to act upon it, he may have created an equity against himself which he cannot resist by setting up the want of a formality in the evidence of the contract out of which the equity in part arose." Then comes this most important passage setting out the essential elements required to establish the part performance which will exclude the statute: " In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; 3rdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4thly, there must be proper parol evidence of the contract which is let in by the acts of part performance." Every one of those four conditions is essential to enable the act relied on to be treated as part performance. It is not sufficient to prove acts referable only to the contract alleged and no other. They must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing.

For that reason the payment of purchase-money alone is not sufficient to exclude the statute, because if the contract is not performed the purchase-money may be recovered back by action.

(1) 8 App. Cas. 475.

But if, on the other hand, possession of the property is changed the relation of the parties is also necessarily changed, and the defendant cannot set up the want of a memorandum because an act has been done which cannot be reversed, and if possession could be recovered it could only be on the terms of the person taking possession being indemnified against any money expended or obligations incurred by him in taking possession.

In my opinion the decision of Bigham J. in *Thursby* v. *Eccles* (1) extending the rule as to the insufficiency of a payment of the purchase price to a payment of rent in advance where possession is not taken is clearly right and covers the present case. There can to my mind be no distinction between the payment of money for rent and payment of the purchase price.

I think, therefore, the judgment of Eve J. on this point was correct.

With regard to the question as to the connection of the documents relied on by the plaintiff, I have nothing to add to what has already been said by Swinfen Eady L.J.

Solicitors: *Chaproniere & Co.; R. G. Harrison.*

W. I. C.

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(1) 49 W. R. 281.

TALBOT *v.* JEVERS.

[1866 T. 142.]

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July 3, 4, 5.

Forfeiture—Felony—Vested Interest in Personal Estate directed to be applied in Purchase of Land—Conversion—Royal Prerogative.

The equitable doctrine of notional conversion of land into money or money into land has no application to the rights of the Crown in cases of forfeiture, escheat, or bona vacantia. It neither increases nor diminishes those rights:—

Held, therefore, that the vested interest of a person convicted of felony before the Act 33 & 34 Vict. c. 23, in personal estate directed to be applied in the purchase of land, was forfeited to the Crown.

Appeal from a decision of Peterson J.

Stirling Freeman Glover, by his will dated October 4, 1864, after appointing an executor and trustee of his will and making certain specific devises and bequests, devised and bequeathed a landed estate in Cork and all his personal estate and effects to his executor upon trust to vest such real and joint estate in the High Court of Chancery in England so that the same might be under the sole control and protection of that Court; and for the purpose of carrying into effect such trusts the testator directed his executor to institute a suit in the Court of Chancery and obtain a decree for carrying out his wishes with regard to the trust property and funds.

The testator then directed that several life annuities should be paid out of the rents and profits of his landed estate and out of the dividends, interest, and produce of his personal property, and, subject to the payment of the several annuities, he directed that the rent, income, and produce of the trust estate, property, and funds should be accumulated in the way of compound interest until the decease of the last survivor of the annuitants, or during such portion of such surviving annuitant's life as the rules of law would permit, and that on the decease of the last survivor of the several annuitants all the said trust estate, funds, and accumulations thereof should be applied by the Court of Chancery in the purchase of freehold estate or land in Great Britain or Ireland, which should be conveyed and assured when purchased to his nephew George Glover and his heirs for ever.

The testator died on April 3, 1866. On December 1, 1866, a bill was filed by the executor for the administration of the estate, and on February 9, 1867, a decree was made accordingly. In January, 1870, the executor was ordered to lodge the trust funds in Court, and in 1871 an order was made for the payment of the annuities under the will. On October 22, 1867, George Freeman Glover, being the person mentioned under the name of George Glover as devisee under the testator's will, had been convicted of felony at Singapore and sentenced to penal servitude for four years.

In 1875 the matter came before the Court on further consideration (see L. R. 20 Eq. 255), and it was then decided that as regards the rents of realty and income of personalty which would accrue during the period between the expiration of twenty-one years from the date of the testator's death and the death of the last surviving annuitant there was an intestacy, and that George Freeman Glover was not entitled during the life of an annuitant to ask for payment of the fund to himself subject to provision being made for the annuities.

On February 2, 1916, the last surviving annuitant died, and thereupon the trustee for the time being under the testator's will presented a petition for a declaration as to who was entitled to the trust funds in Court and for an order directing payment out of the funds in Court accordingly.

At the date of the petition the fund in Court included 16,186*l.* 2*s.* 3*d.* Consols and 300*l.* 16*s.* 6*d.* cash standing to the general credit of the action and representing the testator's personal estate, and the question in this appeal was with regard to this fund.

The fund was claimed (1.) by Emily Mary Moore as assignee of George Freeman Glover, and (2.) by the Attorney-General on the ground that by virtue of George Freeman Glover's conviction for felony in 1867 his interest in the property was forfeited to the Crown.

Peterson J. decided in favour of the Crown.

Emily Mary Moore appealed.

Hughes, K.C., and *Lyttelton Chubb*, for the appellant. The question is as to the effect of a conviction for felony before the Act of 1870 (33 & 34 Vict. c. 23), by which forfeiture for felony was abolished.

By reason of the direction for conversion contained in the will of the testator the fund in Court is in contemplation of a Court of Equity to be regarded as land for all purposes of devolution and right: *Fletcher* v. *Ashburner*. (1) It is therefore not liable to forfeiture. The question is dealt with in Hawkins' Pleas of the Crown, 8th ed. bk. ii. c. xlix. s. 9, p. 639, and Staundford on the King's Prerogative (1607), p. 188. Contingent interests of the felon are not forfeitable: *Stokes* v. *Holden*. (2) But vested interests, though not immediately payable, are liable to forfeiture. That there is no forfeiture in this case is shown by *In re Wharton* (3) and *In re Harrop's Estate*. (4) *In re Thompson's Trusts* (5) will be relied upon against the appellant. That case is not directly in point, but if applied conversely it may be said to be contrary to our contention. It is, however, inconsistent with the other authorities, and was not even cited by Wickens in his argument for the Crown in *In re Harrop's Estate*. (4) The only persons who can claim to have the trust for conversion executed are those entitled under the instrument. The Crown has no right to call for conversion: *Walker* v. *Denne* (6); *Du Hourmelin* v. *Sheldon* (7); *Taylor* v. *Haygarth*. (8) The interest of George Freeman Glover was the right to have a freehold estate conveyed to him when the money was invested in the purchase of the same. When he had served his sentence he was restored to all his civil rights: 9 Geo. 4, c. 32, s. 3. There is no suggestion that before that date he had elected to take the money instead of land. Upon the death of the last annuitant he had a right to have the money invested in land and conveyed to him. What the Crown claims to forfeit is the interest of the felon in the property. That interest at the date of the conviction was an interest in real estate, and not personalty. In the case of claims for death duties the Crown has successfully invoked the aid of the doctrine of notional conversion: *Attorney-General* v.

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(1) (1779) 1 Bro. C. C. 497; 1 Wh. & T. L. C. 8th ed. 347.

(2) (1836) 1 Keen, 145.

(3) (1854) 5 D. M. & G. 33.

(4) (1857) 3 Drew. 726.

(5) (1856) 22 Beav. 506.

(6) (1793) 2 Ves. Jun. 170.

(7) (1839) 4 My. & Cr. 525.

(8) (1844) 14 Sim. 8.

Hubbuck (1); *In re Bateman's Trust* (2); *Barnett* v. *Blake* (3); *In re Harrington's Trusts.* (4) It cannot rely upon the doctrine in one case and disregard it in another. [They also referred to *In re Walker.* (5)]

Clayton, K.C., and *Austen-Cartmell,* for the Crown. The prerogative of forfeiture applies to all personal estate of the convict whether in possession, reversion, or remainder. That prerogative is a common law right, and the equitable doctrine of conversion cannot affect the prerogative rights of the Crown. This case is covered by the decision in *In re Thompson's Trusts.* (6) In considering the question of forfeiture it is material to see what is the actual condition of the property at the time rather than at what it ought to be under the terms of the trust. In *In re Harrop's Estate* (7) and *In re Wharton* (8), which are relied upon for the appellant, there was a compulsory statutory conversion. Those cases are not inconsistent with *In re Thompson's Trusts.* (6)

[WARRINGTON L.J. That is explained by Parker J. in *In re Walker.* (9)]

Yes, it really illustrates our submission. So far as the Crown is concerned in the exercise of its prerogative of forfeiture, it is entitled to regard the property as it is rather than as it ought to be under any doctrine of equity.

Hughes, K.C., in reply.

Swords, for the trustees.

SWINFEN EADY L.J. This is an appeal from an order of Peterson J. dealing with a fund in Court of upwards of 16,000*l.* Consols, and by the order under appeal the judge declared "That His Majesty the King in right of his Royal prerogative is entitled to the funds in Court standing to the general credit of this action as personal estate which were forfeited to the Crown by reason of the conviction in 1867 of George Freeman Glover for felony." Against that order there is an appeal by a party claiming to be the assign of George Freeman Glover. The contention raised upon the appeal is that the fund in Court belongs to the assign of Glover and is not forfeitable and has not been forfeited to the Crown by reason of the conviction for felony of George Freeman Glover. [The Lord Justice stated the facts and continued :] It appears that on October 22, 1867, George Glover, otherwise called George Freeman Glover, the residuary legatee and devisee, was convicted of felony. He was sentenced to penal servitude for four years. It is said that part of his sentence was remitted. Nothing turns upon that, because if no part had been remitted it would have expired some time in the year 1871. By virtue of the statute 9 Geo. 4, c. 32, s. 3, the suffering of the punishment has the like effect and consequence as a pardon under the Great Seal would have had.

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(1) (1884) 13 Q. B. D. 275, 289.
(2) (1873) L. R. 15 Eq. 355.
(3) (1862) 2 Dr. & Sm. 117.
(4) (1860) 29 Beav. 24.
(5) [1908] 2 Ch. 705.
(6) 22 Beav. 506.
(7) 3 Drew. 726.
(8) 5 D. M. & G. 33.
(9) [1908] 2 Ch. 712.

The question is whether upon those facts the proceeds of the testator's residuary estate upon the conviction became an interest passing to the Crown, or whether, as is contended by the appellant, having regard to the trust contained in the will to invest in land, the proceeds are to be considered as land and therefore not subject to the forfeiture for felony. It is not disputed that upon a conviction for felony before 1870 there was a forfeiture of the felon's personal estate, including things in action and interests which were vested although not immediately payable. In Hawkins' Pleas of the Crown, 8th ed. bk. ii. c. xlix. s. 9, it is said : "It seems agreed, that all things whatsoever which are comprehended under the notion of a personal estate, whether they be in action or possession, which the party hath, or is entitled to in his own right, and not as executor or administrator to another, are liable to such forfeiture"—that is to say, forfeiture on conviction for felony; and according to s. 10 it also seems to be settled "that a bond taken in another's name, or a lease made to another in trust for a person who is afterwards convicted of treason or felony, are as much liable to be forfeited, as a bond made to him in his own name, or a lease in possession." It has been decided that where the interest is only contingent at the date of the conviction, and so remains, whilst the convict is under sentence, such interest does not pass to the Crown under forfeiture : see *Stokes* v. *Holden*. (1) There a legacy was given to a person when he should attain the age of twenty-one,

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(1) 1 Keen, 145, 153.

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and, if he should die under that age without issue, over, so that the legatee had only an interest contingent on attaining twenty-one. Whilst still a minor he was convicted of felony, and he underwent his punishment, the period of which expired before he attained twenty-one, and it was held that the legacy remaining contingent until after he had served his punishment did not pass to the Crown. Lord Langdale said that "this contingent legacy, the event upon which the contingency depended not having happened until after the punishment was endured, was not forfeited to the Crown by the preceding conviction." And he declared that the legatee was entitled to receive it.

The interest that we have to deal with in the present case was an interest which vested at the testator's death and was not contingent. In Chitty on the Prerogatives of the Crown, c. xi., s. 1, p. 215, it is stated: "There is a very important distinction between the prerogative right to forfeitures and the right of the Crown, as lord of the fee by escheat, which will be more particularly mentioned in the next section. The law of forfeiture was the doctrine of the old Saxon law, and formed part of the antient Scandinavian constitution, as a punishment for the offence, and does not at all relate to the feudal system, nor is the consequence of any seigniory or lordship paramount. But, being a prerogative vested in the Crown, was neither superseded nor diminished by the introduction of the Norman tenures, a fruit and consequence of which escheats must undoubtedly be reckoned. Escheat, therefore, operates in subordination to this more antient and superior law of forfeiture." That ancient law of forfeiture to the Crown of a chattel of a felon was therefore in existence a very long time before the doctrine of the Court of Equity notionally converting land into money or money into land. It is upon that doctrine that the appellant relies in the present case, and it is urged on her behalf that the doctrine established by *Fletcher* v. *Ashburner* (1) is wide enough to bring her home, the contention being that the equitable doctrine must have effect given to it, and that what is given to the legatee in this case is, according to the terms of the will, land; it is money to be invested in the purchase of land. Therefore, having regard to the principle laid down in *Fletcher*

(1) 1 Bro. C. C. 497; 1 Wh. & T. L. C. 8th ed. 347.

v. *Ashburner* (1), it must be treated for all purposes as land and so not liable to forfeiture. The appellant strongly relied on the language used in *Fletcher* v. *Ashburner* (1), and urged that if the rule is universal, then this fund is not liable to forfeiture. In my opinion that rule does not extend to cases of escheat, or bona vacantia, or forfeiture. The equitable doctrine of notional conversion is not applicable to those cases. It does not extend to take away the right of the Crown, or what would have been the right of the Crown, to forfeiture before that doctrine was introduced. It neither extends to take away the rights of the Crown nor to give the Crown additional rights. That has been so decided, first, with regard to bona vacantia, in the case of *Taylor* v. *Haygarth*. (2) In that case the testatrix had given her real and personal property to trustees in trust to sell immediately after her death, and then to stand possessed of the proceeds in trust for such persons as she should direct by a codicil. She did not make a codicil. She did not leave either an heir-at-law or next of kin. Upon her death the trustees entered and sold the real estate. The Crown claimed both the personal estate—there were no next of kin—and also the proceeds of sale of the real estate. The argument with reference to the real estate in opposition to the Crown's claim was "That the Crown would have no claim to it, by escheat, if it had not been directed to be sold; for, by the will, the legal estate in fee was vested in the trustees, and, therefore, the trustees would have been entitled to hold it for their own benefit, according to *Burgess* v. *Wheate* (3); and that the circumstance of the testatrix having directed the property to be sold, could give no right to the Crown." The argument for the Crown had been: "As the testatrix had left no next-of-kin, the Crown was entitled to her undisposed-of personal estate; and that as she had left no heir and had directed her real estate to be sold out and out, immediately after her death (which distinguished this case from *Burgess* v. *Wheate* (3)), the Crown was entitled also to the proceeds of the sale, as being bona vacantia." It is to be observed that there there was an immediate trust for sale which had been executed. The Vice-Chancellor

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(1) 1 Bro. C. C. 497; 1 Wh. & T. L. C. 8th ed. 347.

(2) 14 Sim. 8, 9, 10.

(3) (1759) 1 Eden, 177.

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said (1): "And I have the opinion of two Lord Chancellors in succession, that there is no equity for the Crown to call for a conversion of the land, in order that it may take the produce of it." Then later on he says: "The point seems to me to be so clear upon the authorities, that I have thought it my duty to give my opinion upon it without delay: and, having regard to what was said by Lord Loughborough in *Walker* v. *Denne* (2), and by Lord Brougham, in reference to it, in *Henchman* v. *Attorney-General* (3), my opinion is that the Crown has no equity to take, from the devisees, the produce of the estate which they have sold of their own authority." That being so, the claim of the Crown to take the proceeds of sale of land as equitably converted by the will—to take them as bona vacantia—failed.

Then the question arose in *In re Thompson's Trusts* (4) with regard to a forfeiture for felony. In that case a testator by his will devised certain tenements to his wife for life, and he devised the rest of his real estate and the real estate devised to his wife for life, from and after her death, upon trust for sale. Then he gave the proceeds of sale between his three children, Robert, Charles, and his daughter Selina. It will be observed with regard to the land sold on the death of the wife that the wife took for life, and there was no devise in trust for sale until from and after her death. What happened was this: The son Robert, who took a share, was convicted of felony, and he was sentenced to a month's imprisonment. The share with regard to which the question arose was divided into two parts; one portion consisted of what was money, although probably the proceeds of sale of real estate sold in the lifetime of the widow; the other was Robert's share in the proceeds of sale of real estate sold after the death of the widow. The testator died in 1851. The son Robert was convicted of felony on April 6, 1853; he was sentenced to a month's imprisonment, which expired in the widow's lifetime, because she did not die until November 26, 1854. This portion was in fact, therefore, land subject to a future trust for sale which did not arise until after the convict had served his imprisonment, and it was held

(1) 14 Sim. 18.
(2) 2 Ves. Jun. 170.
(3) (1834) 3 My. & K. 483.
(4) 22 Beav. 506.

that there was no forfeiture of this money. The argument was (1): "The Crown had no equity to compel the trustees to convert into personalty real estate devised to the widow for life, and, that continuing real estate at the time of her death, it had not escheated or become forfeited to the Crown." Then the report says: "The Master of the Rolls considered that, as to the share of the real estate sold after the death of the widow, it did not pass to the Crown; but as to the share of the fund which had been converted into personalty at the time of the conviction, it was clearly a vested interest in the petitioner, and as such passed to the Crown." In other words, although there was an absolute trust for sale at a future time, and although such a trust would be within the doctrine of conversion established by *Fletcher* v. *Ashburner* (2), yet nevertheless there was no conversion in favour of the Crown so that the Crown could take the proceeds of the land as money. In my opinion, therefore, the equitable doctrine of conversion has no application to the rights of the Crown on a forfeiture for felony; it does not either increase or diminish those rights. Then counsel for the appellant pressed upon us two authorities, and contended that *In re Thompson's Trusts* (3) was inconsistent with *In re Wharton* (4) and *In re Harrop's Estate* (5), and he urged that the view taken in those cases must prevail. In my opinion there is no conflict between those cases. In neither of them did there arise what may be called the actual doctrine of conversion as established by *Fletcher* v. *Ashburner.* (2) *In re Wharton* (4) was a case where the land of a lunatic had been sold for the payment of his debt, and apparently more had been sold than was necessary to pay the debt, but it was sold under a statute which provided how the proceeds or any surplus proceeds were to be regarded: "This was a petition for payment out of Court of a sum, forming part of the proceeds of land of a lunatic, sold under the 9th Geo. 4, ch. 78, sec. 2, re-enacted by 11 Geo. 4 & 1 William 4, ch. 65, which provides, sec. 29, 'That on any sale, mortgage, charge, incumbrance, or other disposition which shall be made in pursuance of this Act, the person whose estate shall be sold, mortgaged, charged, incumbered or otherwise disposed of, and his or her heirs, next-of-kin, devisees, legatees, executors, administrators and assigns, shall have such and the like interest in the surplus, which shall remain after answering the purposes aforesaid, of the money raised by such sale, mortgage, charge, incumbrance or other disposition, as he, she or they would have had in the estate by the sale, mortgage, charge, incumbrance or other disposition of which such monies shall be raised, if no such sale, mortgage, charge, incumbrance or other disposition had been made; and such money shall be of the same nature and character as the estate so sold, mortgaged, charged, incumbered or disposed of.' " Those are the words of the statute. In that case the lunatic died intestate, and at the time of his death his heir was convicted. The heir died also a lunatic and intestate. The Lords Justices in Lunacy held " That the surplus proceeds continued to be impressed with the character of realty, and made an order directing them to be paid to the petitioner after payment of costs." The other case of *In re Harrop's Estate* (1) is to the same effect. It was a decision of Kindersley V.-C. In that case land had been taken compulsorily under statutory powers for a public improvement. The Act under which the land had been taken provided that the proceeds should be laid out and invested under and with the approbation of the Court—" in the purchase of other lands, tenements or hereditaments, which shall be conveyed and settled to, for or upon such and the like uses." That being so, the Court held that the money there paid into Court under s. 98, which contained the imperative direction with regard to its reinvestment in land, in the purchase of other lands, tenements, and hereditaments, was to be considered as realty, and was therefore not forfeited to the Crown. In my opinion, in both those cases the proceeds of sale of land had to be dealt with as land by virtue of the statutory direction in that behalf, and neither of them is an authority upon the application of the doctrine of notional conversion under a will or settlement.

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(1) 22 Beav. 508, 509.

(2) 1 Bro. C. C. 497; 1 Wh. & T. L. C. 8th ed. 347.

(3) 22 Beav. 506.

(4) 5 D. M. & G. 33.

(5) 3 Drew. 726.

Counsel for the appellant also referred to *Attorney-General* v. *Hubbuck* (2) and other cases relating to death duties. It is undoubtedly true that for fiscal purposes the Courts have given the fullest effect to the doctrine of conversion, disregarding the

(1) 3 Drew. 726, 731.

(2) 13 Q. B. D. 275.

outward or actual form of the property and considering its notional character under the doctrine of conversion. In my opinion this class of authority has no bearing on the question of notional conversion as applicable to escheat or forfeiture.

For these reasons I am of opinion that the view taken by the learned judge in the Court below was right and that in this case the fund in Court is a money fund, that it was forfeited to the Crown by the conviction for felony and passed to the Crown, and that the order for payment made in the Court below was right and should be affirmed.

BANKES L.J. I agree.

George Freeman Glover was convicted of felony on October 22, 1867, and as the result of his conviction his goods became subject to forfeiture. The first question is, Had he at the time of his conviction an interest in the goods ? or, to use the language of Hawkins in his Pleas of the Crown, to which we have been referred, in 8th ed. bk. ii. c. xlix. s. 9, p. 639, Had he an interest in something which is "comprehended under the notion of a personal estate" ? At the date of his conviction the property in which he had an interest was money invested in Consols subject to the direction contained in the will of Stirling Freeman Glover that the same should ultimately be applied in the purchase of real estate.

The next question that arises is this, Can the assignee of George Freeman Glover set up as against the claim of the Crown the equitable doctrine of notional conversion so as to entitle her to maintain successfully that the property in which George Freeman Glover was interested is, in the eye of the law, land and not money ? It seems to me that the matter is really past controversy, because, as I read the authorities, that question has been settled long ago. It seems to me it was settled in *Walker* v. *Denne* (1) and in *Taylor* v. *Haygarth* (2), which were followed in the case of *In re Thompson's Trusts*. (3) I will take first *Walker* v. *Denne*. (4) The question arose there as to escheat with regard to property which at the material time consisted of money, but which was subject to a trust or a direction that it should be applied in the purchase of land. The

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(1) 2 Ves. Jun. 170.

(2) 14 Sim. 8.

(3) 22 Beav. 506.

(4) 2 Ves. Jun. 170, 171, 184.

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Crown was contending that it was entitled to take advantage of this equitable doctrine under which the money must be treated as land. The question is very neatly stated where the direction to the Master is given: "Upon farther directions one question was, whether one moiety of the personal property, directed by the will to be laid out in lands of inheritance or long terms for years, was to be considered as real estate, belonging to the Crown as an escheat for want of an heir from the death of Mary King, or, according to the real fact, as personal estate, to be distributed" as such. In giving judgment Lord Loughborough says: "The distinction therefore in the present case is, that that essential circumstance, upon which all the decisions must be bottomed, namely, that the quality of real estate is imperatively and definitively fixed upon it by the instrument, fails in this; and it remains ad arbitrium, whether it is to be considered as land or money. Then is there any reason to raise an equity to convert the money into a different species of property in order to create a different effect? There is no person, claiming under the will of the testator, appearing, to insist, that it shall be considered as that, which de facto it is not. The Crown comes under no head of equity." As I understand that decision, the statement that the Crown comes under no head of equity is wide enough to cover the converse of that particular case, and we have the converse of that particular case now before us for decision. It seems to me that that decision was expressly followed in *Taylor* v. *Haygarth* (1), where the words which I have quoted were cited by the Vice-Chancellor, and the principle so stated is applied in the case of *In re Thompson's Trusts*. (2)

Counsel for the appellant has relied very strongly on the two cases of *In re Harrop's Estate* (3) and *In re Wharton*. (4) It seems to me that the point which he seeks to enforce in this particular case not only did not arise in those cases, but could not, because the question there was not whether by the notional doctrine of conversion the property should be considered, to use the language of Lord Loughborough, what de facto it was not, but whether, having regard to the terms of the two statutes which were material in those two cases, the beneficiaries could as against the Crown rely, not upon any equitable doctrine at all, but upon certain statutory provisions. It is perhaps sufficient to say that those cases are completely distinguishable from the present on that ground. The question from this point of view which was material in those cases was, could the provisions of those statutes be set up against the Crown ? In other words, was the Crown bound by the terms of those two statutes ? That question does not seem to have been raised or discussed in either case, and how it may be decided, if ever raised in some other case, I do not know, and it is not necessary to consider. I do find that a somewhat similar question was raised and discussed in *In the Goods of Hartley* (1), where the question arose as to whether or not the Crown was bound by the provisions of the Land Transfer Act of 1897, which vested the lunatic's estate in the personal representative of the Crown, and it was held that the statute did not bind the Crown. It is not material to consider whether those cases were rightly decided or not. It is sufficient to say that the point raised there was an entirely separate and distinct point from the one to be decided in this appeal. In my opinion the learned judge was quite right.

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(1) 14 Sim. 8.

(2) 22 Beav. 506.

(3) 3 Drew. 726.

(4) 5 D. M. & G. 33.

WARRINGTON L.J. I am of the same opinion. The question we have to determine is whether a fund representing the residuary personal estate of the testator to which George Freeman Glover was entitled at the time of his conviction for felony is forfeited to the Crown or not. The fund in question represents residuary personal estate of the testator Stirling Freeman Glover and the accumulations thereof. Under his will the fund was to be held upon trust to pay certain annuities and to accumulate the surplus income, and, on the death of the last annuitant, to invest in the purchase of land to be conveyed to George Freeman Glover in fee. The interest of George Freeman Glover was an absolute vested interest at the death of the testator, the possession being merely postponed until the death of the last annuitant. No one but George Freeman Glover had any right, title, or interest whatsoever to the fund. He had the absolute dominion over it. It was of course, as between the representatives, real and personal, of George Freeman Glover, if he had not made any disposition of it,

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(1) (1898) 68 L. J. (P.) 16.

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to be treated under the equitable doctrine of conversion as real estate. Glover was convicted of felony in the year 1867, after the death of the testator, and served his sentence of four years' penal servitude, thereby obtaining the benefit of the Act of 9 Geo. 4, c. 32, s. 3, which provides that the endurance of the punishment shall operate as a free pardon under the Great Seal. Those are all the material facts. The question is, Does the doctrine of equitable conversion apply so as to affect the right of the Crown to forfeiture? The right of the Crown to forfeiture is a very ancient right, and it has long been held to extend to the personal estate of every nature of a person convicted of felony, and not to extend to the forfeiture of the felon's fee simple interest or absolute interest in real estate. Is this fund so affected for this purpose by the equitable doctrine of conversion that it ought to be treated not as personal estate but as real estate of the felon? In my opinion the equitable doctrine of conversion has no bearing on the ancient rights of the Crown either to forfeiture to escheat or to bona vacantia.

First with regard to the two cases with which we have not to deal. As to escheat, it was held by Lord Loughborough in *Walker* v. *Denne* (1) that the Crown comes under no head of equity, and therefore is not entitled to insist on the equitable doctrine of conversion so that a fund of a person shall be treated as realty in order to introduce the right of the Crown by escheat. The same point was determined in *Taylor* v. *Haygarth* (2) with regard to bona vacantia. There, again, the Crown was held not entitled, by virtue of the doctrine I have referred to, to insist that property not in the condition of bona should be turned into bona in order that the doctrine of bona vacantia should apply. The same principle was adopted again in the converse case by Kekewich J. in the case of *In re Bond* (3), where money representing the proceeds of sale of land sold under the Settled Land Act, and therefore liable to be reinvested in the purchase of land, was held to be bona vacantia, and therefore to pass to the Crown. In that case it will be observed that the doctrine as to bona vacantia was applied notwithstanding the right there was under the Settled Land Act to insist upon reconversion into land.

(1) 2 Ves. Jun. 170, 185.
(2) 14 Sim. 8.
(3) [1901] 1 Ch. 15.

With regard to forfeiture, the same point was determined in *In re Thompson's Trusts.* (1) There the felon was entitled to land which was to be sold on the death of a person who was alive at the time of his conviction and sentence. The Crown claimed the proceeds of that land under the prerogative right of forfeiture. It was held that the claim failed, because there was no equity in the Crown to compel conversion in order that the right of forfeiture might attach. It seems to me to follow that if the equitable doctrine as to conversion does not apply on the one side it cannot apply on the other, and it follows logically from such cases as *In re Thompson's Trusts* (1), *Walker* v. *Denne* (2), and *Taylor* v. *Haygarth* (3) that, the fund being actually personalty at the date of the conviction and during the sentence, the Crown is entitled to treat it as personalty and to insist on the right of forfeiture.

I desire to say one word about the two cases which were so strongly relied upon against the claim of the Crown; I mean *In re Wharton* (4) and *In re Harrop's Estate.* (5) In my opinion, in neither of those cases was the doctrine of equitable conversion relied upon as protecting the fund in question from forfeiture. In *In re Wharton* (4) it is quite impossible to suggest that the doctrine of equitable conversion had anything whatever to do with it. The question there arose under an Act of Parliament providing for the sale for certain purposes of land of a lunatic, and providing that the surplus proceeds of sale not used for the purposes for which the land had been sold should retain the character of land. Certain land had been sold; there was money which represented the surplus proceeds. The heir of the lunatic had been a felon; he had never elected to take the money as personalty, and it was there held that the Crown could not successfully make the claim on the ground of forfeiture because the money was land. Of course it was. The Legislature, as was pointed out by Parker J. in *In re Walker* (6), has the power, which a private owner of land has not, or a private person has not, of saying that money shall be deemed to be land or land shall be deemed to be money. That is exactly what was done in *In re Walker.* (6)

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(1) 22 Beav. 506.
(2) 2 Ves. Jun. 170.
(3) 14 Sim. 8.
(4) 5 D. M. & G. 33.
(5) 3 Drew. 726.
(6) [1908] 2 Ch. 705.

In re Harrop's Estate (1) was a little nearer the application of the equitable doctrine of conversion. That was a case in which land was taken compulsorily under a statute which provided for reinvestment of the purchase-money in land to be held upon the same uses as the land so taken. In my opinion that makes no difference at all. In both those cases the statute was enacted for the purpose of carrying out the well-known and settled policy of the Legislature. If land is taken against the will of the owner, then the proceeds shall retain the character of land. In the one case the machinery adopted was to declare that the money should be treated as land; in the other case the machinery adopted was to direct the reinvestment in land, but it makes no difference; the purpose of the two statutes is identical, namely, that the original nature of the property sold shall not be altered. In my opinion those two cases have no application to such a case as the present, the decision of Peterson J. was right, and this appeal must be dismissed.

Solicitors for appellant: *Peacock, Fisher & Co.*
Solicitor for the Crown: *The Treasury Solicitor.*
Solicitors for the trustees: *Van Sommer & Chillcott.*

(1) 3 Drew. 726.

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In re CHARTERIS.

CHARTERIS *v.* BIDDULPH.

[1916 C. 1249.]

Will—Legacy out of Residue given on Trust for Sale—Powers to postpone and appropriate—Interest at 3½ per Cent. in Meantime given on Legacy—Bona fide Refusal of Trustees to raise Legacy or appropriate—Refusal proper Exercise of Discretion—Duty to have Regard to Interests of Estate generally.

Testatrix by her will devised and bequeathed her residuary real and personal property to her trustees upon trust to sell and convert and out of the money to arise from such sale and conversion to raise the clear sum of 230,000*l.* and to invest the same in manner thereby authorized. And she declared that "all or any part" of the said sum of 230,000*l.* which should not for the time being have been raised or appropriated should bear interest from her death at the rate of 3½ per cent. per annum and such interest should be deemed "part of the income of the investments representing" the 230,000*l.* And she declared that the trustees should stand possessed of the 230,000*l.* and the investments for the time being representing the same, thereinafter designated "the trust fund," upon trust to pay "as from the day of my death" the income of the trust fund to R. B. C. during his life, and after his death to hold the same on the trusts therein mentioned. Subject and without prejudice to the raising of the 230,000*l.* the testatrix directed that her trustees should hold the residue upon certain trusts therein mentioned. She empowered her trustees at any time or times in their "uncontrolled discretion" to appropriate unconverted investments in or towards satisfaction of the trust fund, or any legacy or share in the premises, and "at their discretion" to postpone the sale or conversion "of any part or parts" of the residue, and directed that the income of the unsold residue should "from the period of my death" go as the income of the proceeds of sale would go "if such sale or conversion into money were then actually made." The trustees refused to raise, or appropriate to, the legacy or any part thereof on the ground (as the Court of Appeal held in fact) that in the interests of all parties concerned in the management of the estate the present time was most inopportune for realization. They, however, stated that it was possible that they might in the exercise of their discretion appropriate some of the investments which had a fixed value towards such satisfaction. The bona fides of the trustees was not questioned:—

Held, that the trustees were entitled to postpone and delay the conversion of the residuary estate beyond one year from the death, and that in postponing or delaying the sale and conversion of the

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residuary estate the trustees had not improperly exercised the discretion vested in them.

Held, also, on construction, that R. B. C., as the tenant for life of the 230,000*l.* trust fund, was only entitled to receive out of the residuary estate interest at 3½ per cent. per annum as from the death of the testatrix on the said sum, or on such part thereof as from time to time should remain unpaid or unappropriated, and was not entitled to receive out of the residuary estate any further sum in respect of income which, had the trust fund been raised and invested or appropriated, he would have received.

Decision of Younger J. [1917] 1 Ch. 377 on these two points reversed and cross-appeal by the tenant for life that the Court should exercise the discretion vested in the trustees dismissed.

APPEALS from a decision of Younger J. (1)

The facts are fully stated in the report of the case in the Court below and sufficiently appear from the judgment of Swinfen Eady L.J. They were shortly as follows:

Lady Margaret Charteris, by her will dated December 31, 1909, devised and bequeathed her residuary real and personal property to her trustees upon trust to sell and convert and out of the money to arise from such sale and conversion to raise the clear sum of 230,000*l.* and to invest the same in manner thereby authorized. And she declared that "all or any part" of the said sum of 230,000*l.* which should not for the time being have been raised or appropriated should bear interest from her death at the rate of 3½ per cent. per annum and such interest should be deemed "part of the income of the investments representing" the 230,000*l.* And she declared that the trustees should stand possessed of the 230,000*l.* and the investments for the time being representing the same, thereinafter designated "the trust fund," upon trust to pay "as from the day of my death" the income of the trust fund to her son Richard B. Charteris during his life, and after his death to hold the same on the trusts therein mentioned. Subject and without prejudice to the raising of the 230,000*l.* the testatrix directed that her trustees should hold the residue upon trust to pay one moiety thereof to the trustees of a settlement, dated December 12, 1887, under which Richard B. Charteris was tenant for life, and the other moiety to the trustees of a settlement, dated April 6, 1894, under which his brother Edmund B. Charteris was tenant for life. She empowered

(1) [1917] 1 Ch. 377.

her trustees at any time or times in their " uncontrolled discretion " to appropriate unconverted investments in or towards satisfaction of the trust fund or any legacy or share in the premises and " at their discretion " to postpone the sale or conversion " of any part or parts " of the residue, and directed that the income of the unsold residue should " from the period of my death " go as the income of the proceeds of sale would go " if such sale or conversion into money were then actually made."

The testatrix died on February 21, 1915.

The trustees refused to raise, or appropriate to, the legacy or any part thereof on the grounds stated in their affidavit in opposition to the summons which is fully set out in the report of the case in the Court below.

The present summons was taken out by R. B. Charteris to have it determined, in effect, whether in refusing to raise the legacy by sale or appropriation at their realizable value of securities for the purpose the trustees were acting within the powers conferred upon them by the will.

The trustees, as to whose bona fides no question was raised, by paragraph 7 of their affidavit in opposition to the summons stated : " In exercise of the wide discretion which Lady Margaret Charteris reposed in us we have therefore determined to postpone or delay the sale or conversion into money of investments forming part of Lady Margaret Charteris's estate and the appropriation of sufficient of such investments to satisfy the said trust fund of 230,000*l.* until the times are more favourable, though it is possible that we may in the exercise of our discretion appropriate some of the investments which have a fixed value towards such satisfaction, and we submit that as our bona fides is not questioned the Court should not interfere with our exercise of the discretion reposed in us."

Younger J. held that the trustees in refusing to sell or appropriate, although they had acted with an honest intention, had proceeded on a misconception of the relative rights of the legatees and the ultimate residue in not regarding the paramount right of the legatees of the 230,000*l.* over the ultimate residue, and had therefore not exercised their discretion with due regard to the purposes for which alone it was conferred on them. They had therefore not really exercised their discretion at all, and consequently it must be referred back to them to consider the exercise of their discretion, but on a proper basis. He further held, on construction, that as and when any sale was made and the proceeds applied, or other appropriation made, in or towards satisfaction of the legacy, the investment so sold or appropriated must be deemed to have been appropriated to the legacy by relation back to the day of the testatrix's death, so as to make the interim dividends interim income of the legacy, the $3\frac{1}{2}$ per cent. interest being brought into account.

From this decision the trustees of the will, the trustees of the settlements of December 12, 1887, and April 6, 1894, and the plaintiff respectively appealed. The appeal was heard on June 25, 26, 1917.

Broughton, for the trustees of the will. Trustees are bound to consider the interests of all their beneficiaries: *In re Tempest* (1); *In re Sandys.* (2) The discretion here given to the trustees was inserted for the benefit of the residuary legatees, as the value of the estate would not affect the 230,000*l.* The learned judge has in effect decided that there was no express discretion vested in them, whereas the testatrix has given to them a discretion for the definite purpose of deciding whether the estate should be realized or not.

[WARRINGTON L.J. The delay must be in favour of the residue.]

That is so. The testatrix has entrusted the trustees with a power which, if exercised, must benefit the residuary legatees. In exercising their discretion the trustees have determined to postpone the realization of the estate until the times are better. That being so, and there being no suggestion that they are not acting bona fide, the Court will not interfere: *Gisborne* v. *Gisborne* (3); *Tempest* v. *Lord Camoys* (4); *In re Blake* (5); *In re Kipping.* (6) The Court would interfere if the trustees refused to realize because they did not approve of the elder brother having so much, or thought that he would waste the money, as that would be making a new will for the testatrix. Younger J. felt it hard on the plaintiff that he was to receive only 8050*l.* a year from the fund, but the fact that the trustees had this discretion may have prevented the testatrix from

(1) (1866) L. R. 1 Ch. 485, 487.
(2) [1916] 1 Ch. 511.
(3) (1877) 2 App. Cas. 300.
(4) (1882) 21 Ch. D. 571.
(5) (1885) 29 Ch. D. 913.
(6) [1914] 1 Ch. 62.

reducing the large sum, as it would have been natural to have done when stocks and shares were falling through the war. The appropriation clause is put in to meet s. 4 of the Land Transfer Act, 1897: Brickdale and Sheldon's Land Transfer Acts, 2nd ed. p. 298A; and is not limited to this fund. *Hampden* v. *Earl of Buckinghamshire* (1) is really in my favour, as the tenant for life was not considering the interests of all the beneficiaries. "Part of the income" means that the 3½ per cent. was to be included in any reference to "income." Strictly speaking it is not income, but is an allowance from one part of the estate to another and might have come out of capital.

Romer, K.C., and *Dighton Pollock*, for the trustees of the settlements of December 12, 1887, and April 6, 1894, representing ultimate residue. The real point is whether the trustees have power to postpone the sale of the estate. It cannot be contended that at the end of the year from the death the trustees are bound to sell or appropriate a reversionary interest. Undoubtedly the trustees in exercising the power to postpone must have regard only to the interests of parties interested in the estate as a whole, and must not consider whether in what they are doing they are benefiting the tenant for life or remainderman. They must decide the matter as if they were absolute owners of the property.

[SWINFEN EADY L.J. referred to *In re Lepine.* (2)]

The power to appropriate is a power to carry out a sale in a particular way. The doctrine of appropriation is not confined to pure personal estate, but extends to chattels real and to real estate which is subject to a trust for sale and conversion: *In re Beverly.* (3)

The position of the plaintiff with regard to the 230,000*l.* legacy is shown by *In re Campbell.* (4) In that case the facts were similar to those in the present case, and it was held that the residuary legatees must be treated as the owners of the estate subject to a charge thereon of the settled legacy, and that the legatees were only entitled to the amount of their legacy with interest at 4 per cent. from the end of a year after the death of the testator. It is submitted here that the plaintiff, as tenant for life of the 230,000*l.*, is only entitled to receive out of the residuary estate interest at 3½ per cent. per annum as from the death of the testatrix on the sum, or

(1) [1893] 2 Ch. 531.
(2) [1892] 1 Ch. 210.
(3) [1901] 1 Ch. 681.
(4) [1893] 3 Ch. 468.

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on such part thereof as shall from time to time remain unpaid or unappropriated, and that he is not entitled to receive out of the residuary estate any further sum in respect of income to which, had the trust fund been raised and invested or appropriated, he would have been entitled. [They also referred to *In re Nickels* (1) on the question whether the trustees could appropriate without the consent of the legatee.]

Clauson, K.C., and *F. E. Farrer*, for the plaintiff. The plaintiff asks by his appeal that it be remitted to the Court itself to determine whether or not all or any part of the legacy should be raised or appropriated: to this extent only he asks for a variation of the judgment of the Court below.

As to the discretion. The correspondence and the trustees' affidavit show, it is submitted, that in not raising or appropriating any portion of the 230,000*l.* the trustees were, though bona fide, yet improperly considering only the benefit of the ultimate residue at the entire expense of the legacy, the prior charge. This appears from the fact shown in the correspondence that the trustees were prepared to appropriate a mass of specific securities—not limited to securities of fixed value such as mortgages—at the time of their proposed appropriation of the value of 211,000*l.* provided that the plaintiff (who is a mere tenant for life of the legacy) would accept that appropriation as being a full appropriation of 230,000*l.*, which was the value of those stocks at the testatrix's death. In effect they thus asked the plaintiff to concur in a breach of trust, and when he declined they practically refused to appropriate any part of the legacy, though the assets are ample on any showing to satisfy the far greater part of the legacy. That they did not do this in the hope of the securities rising in value is clear from the fact that they had proposed to appropriate these very securities, subject only to the impossible condition that the plaintiff, who as tenant for life had no power to do so, should say that 211,000*l.* was 230,000*l.* The intention to benefit the ultimate residue at his expense thus clearly appears and shows the reasons for their refusal to raise or appropriate.

Then as to the construction of the clause. The interest at 3½ per cent. on the whole 230,000*l.* was to be deemed part only of and not the whole income of the securities to be appropriated. The ultimate residue is given subject and without prejudice, not to the interest at 3½ per cent., but to the raising of the 230,000*l.*; the 230,000*l.* is to be raised out of capital, not out of income. There is no express power to postpone the raising of the legacy itself; the only power is to postpone the conversion of any part and not the whole of the residuary estate, and the rents and income of the unconverted residue are to go as if conversion had actually taken place. These considerations show that the legacy had actual and complete priority over the ultimate residue; that no income could come to the residue until the legacy with full income thereon had been raised; and that the legacy was to be raised entirely out of capital and not in part out of income. The object of the trustees is to raise the legacy in part out of income.

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(1) [1898] 1 Ch. 630.

SWINFEN EADY L.J. These are three appeals from a decision of Younger J., and they deal with two questions which arise in the matter of the estate of Lady Margaret Charteris. She died on February 21, 1915, and by her will, after giving various pecuniary legacies and annuities and making certain specific dispositions of her property, she gave her residuary real and personal estate upon trust for conversion, and to raise a clear sum of 230,000*l.* free of duty, the income of which was to be paid to her son Richard for his life, and subject thereto the residue of her estate was given in moieties, one moiety to the trustees of a settlement dated December 12, 1887, her son Richard's settlement, and the other moiety to the trustees of a settlement of April 6, 1894, which was her other son's settlement. Under those two settlements her two sons are respectively tenants for life, so that the effect of the disposition is that the plaintiff, Richard Charteris, takes the income for life of the 230,000*l.* and under the settlement the income of a moiety of the residue, and his brother is entitled to the income of the other moiety of the residue under that brother's settlement.

It appears that after the death of the testatrix her executors and trustees proceeded with the administration of the estate, and had valuations prepared of the various securities to which the testatrix was entitled, and a list was prepared of the securities which they proposed to appropriate in respect of the 230,000*l.*, distinguishing those securities from the remaining portions of the estate, and it appears that (as at the date of the death of the testatrix), setting aside securities which were valued at 230,000*l.*, there was a residue of 91,139*l.*, which residue was subject to numerous claims upon it.

On December 22, 1915, the solicitors for the executors furnished to the solicitors for the plaintiff a copy of that list, suggesting that the securities therein comprised, which at the date of the death of the testatrix were worth 230,000*l.*, might properly be appropriated to represent the settled fund. That left a residue of 91,139*l.*, but the executors observed that the funds remaining after the appropriation were subject to the payment of estate duty, to the legacy of bonuses, which was a legacy of between 17,000*l.* and 18,000*l.*, and to the provision of the annuities and general payments.

Upon that proposition being communicated to the solicitors for the plaintiff they objected to the appropriation. They pointed out that their client, Colonel Richard Charteris, was entitled to have 230,000*l.* in cash, or the value thereof, as at the date of the appropriation; that almost all the securities comprised in the list had dropped in value since February 21, 1915, the date of the death, and some of them considerably, and that if their client liked to invest in any of these securities he should do so on the basis of present prices. In other words, they raised the point that the value of the securities appropriated should be the value as at the date of appropriation, and not as at the date of the testatrix's death.

In my opinion that contention was well founded; and upon that point being raised by the plaintiff's advisers the executors took the opinion of counsel with regard to the appropriation, and, having taken it, they sent a copy of it to the plaintiff's advisers. Then in February, 1916, that is, about a year after the death of the testatrix, the executors caused the investments comprised in these two respective lists to be revalued so as to ascertain their values as at the date of this new valuation, February, 1916. The result of that was that the securities in the list representing the 230,000*l.* were then valued at only 211,424*l.*, and the securities which had remained after the appropriation, and which had previously been valued at 91,139*l.*, in the new valuation were valued at only 81,082*l.* Therefore in the interval between the death of the testatrix and the date of the new valuation there was a depreciation of between 28,000*l.* and 29,000*l.* in those securities. The view which the executors then took

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was that, having regard to the terms of the will, the appropriation or realization of the securities would have to take place on the footing that at the date of payment or appropriation the legatee was entitled to 230,000*l.*, but that, having regard to the great depreciation in the value of all securities owing to the unprecedented war, the time was most unfavourable to realize the securities, and they say in their affidavit: "In the exercise of the wide discretion which Lady Margaret Charteris reposed in us, we have therefore determined to postpone or delay the sale or conversion into money of investments forming part of Lady Margaret Charteris's estate by the appropriation of sufficient of such investments to satisfy the said trust fund of 230,000*l.*, until the times are more favourable." In other words, they thought that as there was so great a depreciation of securities, some being very low indeed and some even unsaleable, the time was most unpropitious for the realization of the estate for the purpose of providing this 230,000*l.*, and they decided in the exercise of their discretion that appropriation or realization should be postponed for a time. They added in their affidavit: "it is possible that we may in the exercise of our discretion appropriate some of the investments which have a fixed value towards such satisfaction," and they submitted that as their good faith was not questioned the Court should not interfere with the exercise of the discretion reposed in them by the will.

One of the securities in the list is a mortgage, which has been referred to as the Eton mortgage, for a sum of 25,000*l.* It is not suggested that the value of the mortgage rises or falls, and the executors have intimated that in all probability they would see their way to appropriate that security on account of the 230,000*l.*; and this is not a case in which they decline to do anything, or to make any appropriation whatever. It is a case in which they say that they have a discretion to defer realization, and that they are honestly exercising it to the best of their judgment and ability, having regard to the rights of all parties interested under the will, and that the Court ought not to interfere with this discretion. That is the way in which the case is put on behalf of the executors and trustees.

A question may arise as to whether the estate is sufficient for all demands upon it under the testamentary dispositions of the testatrix. In fact the plaintiff's solicitor, Mr. Burrell, in his affidavit says : "I believe that the executors have funds in hand of a sufficient value to enable them to discharge all their costs, charges and expenses, the duties and to provide for the pecuniary life annuities. But, if not, a question will arise whether on the true construction of the will and codicils the said settled legacy of 230,000*l.* has not priority over the pecuniary legacies not specifically bequeathed (which have been paid) and over the life annuities or how otherwise it ranks in relation to the same." We have not sufficient particulars of the estate brought down to date to know whether the question that Mr. Burrell there refers to will arise in fact in the administration ; but it may do so.

The view which the plaintiff has insisted upon, and which was taken by his advisers before the present originating summons was issued, appears in his solicitors' letter of February 21, 1916, in which they said : "We observe that the executors do not propose to allocate this legacy in stock or pay the same in cash, but to continue to pay Col. Charteris 3½ per cent. on the ground that there will not be sufficient residue." I think that is not quite accurate. The position taken up by the executors is not that they will decline to do this in order to increase the residuary estate. What they say is that in the interest of all parties concerned in the management of the estate the present time is most inopportune for realization.

The contention put forward on behalf of the plaintiff was this : "In our view," Messrs. Farrer & Co. write, "this attitude of the executors is not justified. Their first duty after payment of the expenses is to pay this legacy and to disregard the position of the residue."

It has often been said that the position of the trustees of an estate is to hold an even hand, and to do the best for the estate, looking upon it as a whole. In *In re Lepine* (1) Fry L.J. expresses himself in this way : "I agree, as fully as it can be expressed, that it is the duty of trustees to hold a perfectly even hand between all their cestuis que trust." In other words, their duty is, on the one hand, not unduly to delay the payment or provision of any of the legacies, but on the other hand not to sacrifice the interests of persons entitled in remainder by realizing the estate and applying it, so far as it will extend, for the benefit of a pecuniary legatee at an inopportune

(1) [1892] 1 Ch. 210, 219.

time and when all securities are unprecedentedly low, and some practically unsaleable. They must act prudently and properly in the management of the estate as a whole.

It is not contended, or even suggested, by the plaintiff either that there is any want of good faith on the part of the trustees or that the present circumstances are not such that these securities are either unprecedentedly low, or, as to some of them, incapable of immediate realization at any fair or proper price. There is no contest as to that. We have no evidence as to the extent of the depreciation since the valuation made some fifteen months ago. It may be considerable. But the position taken by the plaintiff, and the position presented to this Court in argument, is one based on the true construction of the will. It is said on behalf of the plaintiff that according to the true construction of the will, which it is the duty of the executors and trustees to carry out, the plaintiff is entitled to have his legacy raised and paid at once, so much so that Mr. Burrell in his affidavit put it in this way: "The applicant's contention" (that is, Colonel Charteris's contention) "is that on the true construction of the said will and codicils the executors had no power to defer raising the said settled legacy or such part as they could safely raise in due course of administration beyond at the latest the 21st Feb., 1916" (that is one year from the death), "and that if on the true construction they have such power their deferring the raising thereof or such part thereof as aforesaid beyond that date was an improper and invalid exercise of their discretion as proceeding on a misconception of the rights of the ultimate residue under the said will." It is necessary, therefore, to refer to the will and see exactly what the provisions of it are which the executors are bound to carry out.

After making the previous dispositions to which I have already shortly referred, the testatrix devised and bequeathed to her trustees "all my real and personal property and all property over which I have or shall have power to dispose by this my will under any general power of appointment to hold the same unto and to the use of my trustees their heirs, executors, administrators and assigns respectively according to the nature and tenure of the same premises respectively upon trust to sell call in collect and convert into money such parts of the same property as shall not consist of ready money. And upon trust out of the money to arise as aforesaid and my ready money to raise the clear sum of 230,000*l.* free of all duty (including settlement estate duty) costs and other deductions which I hereby direct shall be paid out of the residue of the said money And to invest in manner hereinafter authorised the said sum of 230,000*l.* with power from time to time to vary" such investments during the life of her son Richard Charteris with his consent.

Then also she declared "that all or any part of the said sum of 230,000*l.* which shall not for the time being have been raised or for which property shall not have been appropriated under the power hereinafter contained shall bear interest from my death until such raising or appropriation at the rate of 3½ per cent. per annum and such interest shall be deemed to be part of the income of the investments representing the said sum. And I declare that my trustees shall stand possessed of the said sum of 230,000*l.* and the investments for the time being representing the same respectively which sum and investments are hereinafter designated 'the trust fund' upon trust to pay as from the date of my death the annual income of the trust fund to Richard Charteris during his life."

It will be observed that there is no gift of that 230,000*l.* apart from the trust to sell and pay it out of the proceeds of sale and out of ready money.

Then the testatrix refers to property which shall not have been appropriated under the power thereinafter contained, and I turn to that power of appropriation, which is in a subsequent part of the will. The testatrix there declares that "in substitution for the power conferred on personal representatives by the Land Transfer Act, 1897, I empower my trustees at any time or times in their or his uncontrolled discretion to appropriate any part of the property whether real or personal hereinbefore devised and bequeathed to my trustees upon trust for sale and conversion in its then actual state of investment in or towards satisfaction of the trust fund or any legacy or share in the premises, and for that purpose to determine conclusively the value of the trust premises or any part or parts thereof in such manner as they or he shall think fit and where my trustees retain the property so appropriated as aforesaid to retain it as an authorised investment of the trust fund legacy or share in respect of which such property shall be so appropriated and retained but with power nevertheless to vary the investment in manner in this my will mentioned." That is a power to appropriate which the trustees may exercise in their uncontrolled discretion. They cannot be required to appropriate. The legacy must in due course be raised and paid or provided for, and the trust for raising it is an enforceable trust, but the legatee cannot insist upon the power being exercised to appropriate in specie any portion of the estate. It is a power which the trustees in their uncontrolled discretion are in a position to exercise.

Language of that kind was considered by the House of Lords in *Gisborne* v. *Gisborne* (1), and by the Court of Appeal in *Tempest* v. *Lord Camoys* (2), which had *Gisborne* v. *Gisborne* (1) before it. *Tempest* v. *Lord Camoys* (2) was a decision of Chitty J., which was afterwards affirmed on appeal. Chitty J. there referred to *Gisborne* v. *Gisborne* (1), and then said: "The words in the will are 'uncontrollable authority,' "—in this will they are "uncontrolled discretion "—" but it is to be observed that both the Court of Appeal and the House of Lords in the decree varied the expression by using the words 'the trustees have an absolute discretion.' " That is the construction which was placed upon the instrument by the Court of Chancery—" the trustees have an absolute discretion." Then he continued: "The result is this, although I do not think this argument is really needed, upon construing the will the Court of Appeal and the House of Lords put in the very term 'absolute' in lieu of the term 'uncontrollable,' to express the meaning of the decision at which they arrived—the very term which we have in this will. Without the assistance of this judgment, I should have said that 'absolute' does mean without any conditions, without any check, and without any control."

In that case, on appeal, Sir George Jessel said (3): "It is very important that the law of the Court on this subject should be understood. It is settled law that when a testator has given a pure discretion to trustees as to the exercise of a power, the Court does not enforce the exercise of the power against the wish of the trustees, but it does prevent them from exercising it improperly.

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(1) 2 App. Cas. 300.

(2) 21 Ch. D. 571, 574.

(3) 21 Ch. D. 578.

The Court says that the power, if exercised at all, is to be properly exercised." Therefore the power of appropriation is not a power which trustees can be compelled to exercise.

There are two further provisions in the will to which attention should be drawn. One is the express authority to postpone or delay sale or conversion, and the other is a provision dealing with the actual income obtained from the estate. The testatrix declares: "I further empower my trustees at their discretion to postpone or delay the sale or conversion into money of any part or parts of my real and personal estate hereinbefore directed to be sold and converted into money and to allow the same respectively to remain in the state of investment or condition existing at the time of my death. And I hereby further direct that meanwhile the rents profits and income arising from the real or personal property so remaining unsold or unconverted into money (whether such property be of a permanent or a wasting nature) after payment thereout of all rates taxes expenses of insurance and repairs and other outgoings which my trustees shall think fit to pay shall from the period of my death go and be paid to such persons or person and be applied in such manner as the annual income of the monies to be produced by such sale or conversion into money would go and be payable unto or be applicable in if such sale or conversion into money were then actually made but so that no reversion or other property not actually producing income shall be treated as producing income for the purposes of this my will."

In my opinion the effect of this clause is only to provide that whether the unconverted property were of a permanent or a wasting nature—an instance of the latter case would of course be short leaseholds—the income derived from it was to be treated and be payable as income under the will, and that a reversion not actually producing income was not to be treated as producing income. In other words, the effect of this clause, which is almost if not quite in usual form, is to exclude the application of the rule in *Howe* v. *Earl of Dartmouth*. (1)

I have now drawn attention to all the parts of the will that I think are material for the purposes we have to consider here. The effect is to create a trust to sell and to raise 230,000*l.*, with an express power

(1) (1802) 7 Ves. 137a.

to postpone or delay the sale or conversion of any part or parts of the real or personal estate.

It was urged on behalf of the plaintiff that the executors had no power to defer raising the settled legacy beyond at the latest February 21, 1916 ; in other words, that, during the first year from the death, the executors were bound to raise this legacy. But where was the obligation upon them to sell for the purpose of raising the legacy during the first year ? I have dealt with, and pass by, the question of appropriation. Why were they bound to sell ? Effect must be given to the express power to postpone or delay sale or conversion into money of any part or parts of the estate. In my opinion, where there is an express power to postpone contained in a will, and where the executors are honestly exercising that power by reason of its being inexpedient to sell at the present time, it is immaterial that there is no sale within a year of the death. It may well be that in the absence of any such power to delay they might have to realize within a year from the death, for that is the ordinary period for realization ; but where there is an express power to postpone or delay the sale of any part or parts of the real and personal estate, and "to allow the same respectively to remain in the state of investment or condition existing at the time of my death," I am of opinion that there is no obligation upon the trustees to exercise the trust for sale or conversion within twelve months from the death. The point was taken and insisted on in the correspondence, just as the year expired, and then shortly afterwards this summons was taken out.

The learned judge in the Court below proceeded upon these grounds ; he said (1), after reading that portion of the will to which I have already referred : "It seems plain, therefore, that the trustees' first duty in a question with residue is to provide that legacy in full, and that special duty serves to distinguish the case from that of *In re Sandys* (2), to which some reference was made in the course of the argument. And I cannot doubt that, although with the best intentions, the trustees have not regarded that duty as of paramount obligation ; on the contrary they have, as their explanation shows, entirely reversed the position, and have treated the claims of

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(1) [1917] 1 Ch. 386.
(2) [1916] 1 Ch. 511.

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residue as their first care to the most material prejudice of the rights of the legatee of 230,000*l.*"

I am not able to take that view. In my judgment the executors and trustees have been acting fairly and properly in the general interest of the estate, and in the interests of all parties entitled as beneficiaries under the will, and, that being so, I see no reason for saying that they have proceeded upon any improper principle, or that the case comes within the language of Lindley L.J. in *Hampden* v. *Earl of Buckinghamshire* (1), where he said: "An honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect; and, if he is so acting, and the Court can see it although he cannot, it is in my opinion the duty of the Court to interfere." Accepting to the full that statement of Lindley L.J., I am of opinion that the trustees have not been acting unjustly, or upon any wrong principle, and that the delay in raising and setting aside a fund of 230,000*l.* is justifiable under the circumstances of the case. Mr. Farrer urged upon us that the trustees were refusing to make any appropriation whatever. That is not the fact. The trustees state in their affidavit that it is quite possible that, in the exercise of their discretion, they may appropriate a sum, and, as I understand, the Eton mortgage of 25,000*l.* is one which they have selected as a security which it would be proper to appropriate.

For these reasons I am of opinion that, upon this part of the case, the judgment of the learned judge was erroneous, and that the appeal should be allowed and the judgment reversed.

Then there is a further distinct and separate point, and it is this: What interest does Colonel Charteris receive upon the 230,000*l.* until it has been raised or appropriated according to the true construction of the will? The learned judge has decided that the plaintiff, as against residue, will be entitled to the interest upon such securities as may ultimately be either actually sold or appropriated to meet that sum as from the date of the death until the appropriation or payment, bringing into account the interest at 3½ per cent. presently payable; or in other words, that although Colonel Charteris does not take the valuation as at the death, but as at the date of appropriation, he is nevertheless entitled as from the

(1) [1893] 2 Ch. 531, 544.

death to the actual income produced by the securities which shall ultimately be resorted to, either by sale or appropriation, to raise the 230,000*l.*, giving credit as an interim payment for interest at 3½ per cent. per annum that is directed to be paid under the will.

The trustees of the will and settlements contend that this is a misconception of the will and that all that the plaintiff is entitled to, until his legacy is raised or appropriated wholly or in part, is interest at the rate of 3½ per cent. on the part unpaid or unappropriated, but that as soon as there is payment or appropriation, then the legatee will take the interest on the sums so appropriated, or on the investments of the money so paid. That is the dispute between the parties, and it turns entirely on the construction of the will.

The testatrix says that "all or any part of the said sum of 230,000*l.* which shall not for the time being have been raised or for which property shall not have been appropriated under the power hereinafter contained shall bear interest from my death until such raising or appropriation at the rate of 3½ per cent. per annum, and such interest shall be deemed to be part of the income of the investments representing the said sum"; and then that "the trustees shall stand possessed of the said sum of 230,000*l.* and the investments for the time being representing the same respectively which sum and investments are hereinafter designated 'the trust fund' upon trust to pay from the day of my death the annual income of the trust fund to Richard Charteris during his life." In my opinion, according to the true construction of that clause, what the trustees are to pay to Richard Charteris as from the day of the death of the testatrix is the annual income of the trust fund as she has defined and determined such annual income, whether actual or notional income. It may be that some payment would be made out of ready money that would not produce any income at all; still there is to be notional income at the rate of 3½ per cent., and it is to be deemed to be part of the income of the investments representing the said sum. When investments representing 230,000*l.* have been appropriated for that purpose, the legatee takes the income of these investments, but so long as no such appropriation has been made, or in so far as there is no such appropriation, the sum remaining unraised and unpaid is to bear interest at the rate of 3½ per cent. per annum,

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whether the trust securities are actually earning no interest at all or are earning more or less than 3½ per cent. The plaintiff is not, therefore, entitled, as the learned judge held, to the entire income of these securities from the death. Until payment or appropriation the trust legacy bears interest at 3½ per cent.

In my opinion, on this second point the judgment below should be reversed, and a declaration as to interest, to the effect which I have stated, inserted in the order.

Bankes L.J. I agree. I do not propose to add anything with reference to the construction of the will, which the Lord Justice has dealt with at length, and I content myself by saying that I entirely agree with his view as to the construction. I should like, however, to refer to the other point, with regard to the exercise by trustees of their discretion, because I am quite unable to agree with the conclusion arrived at by Younger J. as to the motive which influenced the trustees in the decision to which they came. Under the will the trustees are given a discretion to postpone or delay the sale or conversion into money of any part or parts of the estate, and they are given an absolute discretion to substitute appropriation, if they think fit, for the sale or conversion into money. This is one of the cases, as it seems to me, where grounds upon which trustees could legitimately and properly exercise their discretion to postpone a sale are also legitimate and proper grounds for their refusing to exercise their power of substituting appropriation for sale.

The learned judge, in substance, has held that the trustees never exercised their discretion in the matter at all; and he seems to have come to the conclusion with reference to their action that they never applied their minds to the question as to whether the time was appropriate or not appropriate for selling or realizing securities, or whether, if a sale was postponed, values were likely to be improved or not, but that, without applying their minds to that question at all, they realized that a refusal to sell or a refusal to appropriate would have the effect of enabling them to rely upon the clause in the will authorizing them to pay Colonel Richard Charteris interest at the rate of 3½ per cent. and would thus be to the advantage of the brother, Edmund Charteris. What the learned judge says about it is this (1):

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(1) [1917] 1 Ch. 387.

"In other words, they have not, as I think, exercised their discretion at all in any proper sense of the term"; and the reasons he gives for that are (1): "they now refrain from making any appropriation or from proceeding to realize any of the securities towards meeting even a part of the legacy, not because that appropriation would now be inexact or the realization difficult, and not because they are advised or believe that the prospects of more favourable realization are either immediate or, even if remote, reliable, but merely, as I think, because either appropriation or realization at the present time would leave little or nothing for residue; and they are not deterred from this decision by the fact that it involves, as they read the will, that nothing more shall in the meantime be paid to the plaintiff beyond 3½ per cent. per annum by way of interest on the amount of his unpaid legacy." Then the learned judge goes on to speak of the interest of Colonel Richard Charteris as a paramount interest.

I do not agree that the trustees are entitled to consider the interest of either beneficiary in this matter as paramount. It is quite true that Colonel Richard Charteris's legacy must be paid before anything can be paid out of residue, but when the trustees have to consider whether or not they shall exercise the discretion given them under the will their duty is not to consider the interest either of the one beneficiary or of the other beneficiary as paramount, but to consider the interest of the estate as a whole. It is obvious that a decision which is considered to be for the ultimate benefit of the estate may be for the immediate advantage of one beneficiary and to the disadvantage of the other, and that is the case here, because this affidavit of the trustees is drawn in such a way as to indicate that the trustees realize what will be the consequence of their decision; this consequence has been treated as though it were the ground for their decision. In that view I am quite unable to agree. It is quite true that the affidavit is not perhaps, if I may use the word, astute. The trustees do point out what the consequence of their decision would be, and that they subsequently use the word "therefore," upon which Mr. Clauson has laid so much stress; but a portion of the affidavit in which they state that they have come to the conclusion that they ought to postpone or delay the conversion until the times are more favourable must be disregarded altogether in order to come to the conclusion that they have not taken into consideration the interest of the estate as a whole in deciding whether the present is either a proper or desirable time in which to realize, or whether, if the sale is postponed, there is a probability of values improving.

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(1) [1917] 1 Ch. 386.

In my opinion the trustees have stated that they have come to their conclusion not upon the grounds stated by the learned judge, although the consequences may be what he has pointed out, but upon grounds properly taken into account by them before they exercised their discretion as to what the result of realizing the estate now would be in contrast with the possibilities if they postpone the sale for a time. As the decision at which the learned judge arrived on that point seems to have influenced his judgment, I have thought it right to state the reasons why I do not agree with him.

WARRINGTON L.J. I am of the same opinion, and because (and only because) we are differing with the learned judge in the Court below I will state my reasons as shortly as possible.

The appeals raise two points, first, as to the exercise by the trustees of a discretionary power to postpone or delay the sale or conversion into money of any part or parts of the residuary real and personal estate by the will directed to be sold and converted into money, and, secondly, as to the construction of the will in reference to the provision that a sum of 230,000*l.*, or so much thereof as for the time being shall not be actually raised, shall bear interest at 3½ per cent. The second question is purely one of construction.

With regard to the first point, the real question appears to me to be whether, as the learned judge thinks, the trustees have purported to exercise their discretion, but in so doing have acted on a wrong principle and from wrong motives. The learned judge has come to the conclusion that they have so acted, because he has, in effect, determined that they have been actuated solely by a desire to benefit the persons entitled to the ultimate residue to the disadvantage of the person entitled for life to the income of the 230,000*l.* With that conclusion I am entirely unable to agree. The duty of trustees entrusted with a discretionary power of this kind is not to have regard to the interests of one person or of another interested in the estate, but to have regard to the interests of the estate as a whole, and I take it that in such a case as the present this means that they are to exercise their discretion in the way that will, in their opinion, tend to produce ultimately the largest amount of money for distribution amongst the several persons interested. That, in my judgment, is what they have done. They have told us, in terms reasonably clear, both in their letters before these proceedings were taken and in the affidavit which they filed in the course of the proceedings, that in their view, having regard to the financial position at the present time, realization could only take place now under the most unfavourable circumstances; and that they have therefore thought it more advisable in the interests of the estate to postpone realization rather than to place securities forming part of the estate upon the market at prices which would result in disaster to the whole estate.

In my judgment they in so doing were acting in the proper exercise of their discretion. The result is that the tenant for life of the 230,000*l.* will probably receive a smaller amount of income than he would receive if the trustees had converted the estate. But that seems to me, with all deference to the learned judge, to be immaterial. He has—with all respect to him—confused the motive of the trustees in the exercise of their power, with the consequences that result from that exercise. The consequences that result are due to the way in which the testatrix has chosen to express her wishes, including the insertion in the will of the discretionary power, the exercise of which is in question. It is only in that sense that the effect on the various beneficiaries is the result of the exercise of the discretionary power, and I suppose there never was a power to postpone conversion which did not to some extent affect some of the persons interested in the testator's estate prejudicially and others advantageously. If the trustees determine to postpone the realization of a security producing a high rate of interest, the investment of which on realization would probably produce a lower rate of interest and thereby give an advantage to the immediate tenant for life, can any one say that in such a case as that the trustees are not justified in postponing the realization of that particular security? Of course this could not be said for a moment.

In my judgment, therefore, the trustees in determining to postpone realization under the circumstances relating to this estate were acting on proper grounds, and, as they were acting on proper grounds, it is impossible for this Court to interfere.

But it is said that there was an alternative course before them, and that if they determined to postpone conversion they were bound to take the alternative course of appropriating securities to answer the legacy. I would point out that this is really not taking an alternative course at all. In reality the power to appropriate is a power to sell at a price to be ascertained, as the trustees may determine, the particular securities which are appropriated to the trust fund. So that for the trustees to appropriate securities at the price of the day to the value of 230,000*l.* comes, in the result, to exactly the same thing as if they had sold the securities and paid the proceeds to the trust fund. If they were entitled to postpone realization of the securities, they were, in my opinion, equally entitled to postpone the appropriation of the securities, seeing that the appropriation is also left to their discretion.

For these reasons I think the order of the learned judge which declares that the trustees have acted upon a misconception of the rights of the parties, and that they have not therefore exercised their discretion, must be discharged.

The second point is a question of construction, as to which I will only say a few words ; but again, as I am differing from the learned judge, I had better state what my view is. To state the matter shortly, the testatrix directed the trustees, out of the proceeds of sale and conversion, to raise a sum of 230,000*l.* and to invest the sum in certain specified securities, and then, omitting for the moment the clause upon which the question turns, she declared that the trustees should stand possessed of the 230,000*l.* and the investments for the time being representing the sum upon trust to pay the annual income to Richard Charteris.

So far, therefore, all that the testatrix had done was to direct the trustees to pay the annual income of the 230,000*l.*, or the investments of the 230,000*l.*, to Richard Charteris, but it occurs to her, or to the draftsman who drew the will, that that is not quite sufficient, because there will necessarily be a period during which some part or the whole of the 230,000*l.* will not have been raised and invested, and accordingly she inserts a special provision declaring that in that

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case so much of the 230,000*l.* as has not been raised shall bear interest at 3½ per cent. from her death; and then as she has made no provision as to how that interest is to be treated, as between capital and income, she inserts the concluding words, that "such interest shall be deemed to be part of the income of the investments representing the said sum."

With all respect to the learned judge and to those who have argued the case on behalf of the plaintiff, I fail to see any difficulty whatever in those words. They seem to me to have been inserted for the purpose, and for the sole purpose, of enabling the trustees to interpret the will, and to include so much of the money in their hands as represents interest on the 230,000*l.*, or on any part of it, as part of the income which they have to dispose of as income.

In my judgment, on this point also the judgment of the learned judge was erroneous, and the order, so far as that declaration is concerned, should also be varied.

Solicitors: *Hallowes & Carter; Farrer & Co.*

W. I. C.

C. A.
1917
July 18, 19.

In re SAILLARD.

PRATT *v.* GAMBLE.

[1917 S. 556.]

Will—Direction to pay 200*l. per Annum "free of all duties" to Solicitor-Trustee for Trouble in acting—Income Tax.*

Testator directed payment out of the income of his estate of 200*l.* per annum "free of all duties" to a solicitor-trustee for his trouble in acting as a trustee of his will, so long as he should continue to act as such trustee, and also in addition gave him power to charge and be paid for professional and other charges:—

Held, affirming the decision of Neville J., ante, p. 140, that the sum of 200*l.* was to be paid subject to and not free of income tax.

Appeal from a decision of Neville J. (1), where the facts are fully stated.

John Gamble appealed.

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(1) Ante, p. 140.

J. F. Carr, for the appellant, repeated the arguments used in the Court below, and in addition contended that the case was not governed by the decision in *Wall* v. *Wall* (1), where the words were "clear of all taxes and deductions." That case was treated in Jarman on Wills, 6th ed. vol. ii. p. 1134, as overruled. He further relied upon *In re Bannerman's Estate* (2), and cited *Attorney-General* v. *Eyres* (3), *Turner* v. *Mullineux* (4), *Festing* v. *Taylor* (5), and *Gleadow* v. *Leetham.* (6) [*Peareth* v. *Marriott* (7) was also referred to.]

Wright Taylor, for the respondents, was not called upon to argue.

Owen Thompson, for the trustees other than the appellant.

SWINFEN EADY L.J. referred to the terms of the will and continued: It appears that John Gamble joined in proving the will and Algernon Edward Sydney, the executor named in the will, renounced probate of the will and codicil. So that under those circumstances John Gamble became entitled to an annuity or sum of 200*l.* per annum free of all duties; and the question raised by this appeal is whether Mr. Gamble takes that annual sum free of income tax—in other words, whether the gift comprised in the will is a gift not only of the sum of 200*l.* per annum, but of a sum equal to the income tax on the amount, so that John Gamble may receive 200*l.* per annum and that the income tax in respect of that annuity may be paid out of the estate.

Neville J. has decided that the annuitant must bear his own income tax, and against that decision the present appeal is brought. It was no doubt at one time thought that a testator could not by will give interests that would be free of income tax, and it was thought that a disposition of that sort would be contrary to the provisions of the Income Tax Acts. That notion has now been held to be entirely erroneous, and it is simply a matter of construction of the will whether the testator has given the annuity together with a sum equal to the income tax to the annuitant so that the annuitant may receive the annuity free of income tax, or has simply given an

(1) (1847) 15 Sim. 513.
(2) (1882) 21 Ch. D. 105.
(3) [1909] 1 K. B. 723.
(4) (1861) 1 J. & H. 334.
(5) (1862) 3 B. & S. 217.
(6) (1882) 22 Ch. D. 269.
(7) (1882) 22 Ch. D. 182.

annuity and left the annuitant to bear his own income tax. That is entirely a question of construction.

In *In re Bannerman's Estate* (1) Hall V.-C. says: "The rule was after all this"—and he deduces this rule as the result of the authorities to which he refers—"Whether or not an annuity should be free from any deduction for income tax must depend upon the meaning of the words used by the testator, i.e. if upon the true construction of the words the Court considered that it was intended by the testator that the annuitant should have the specified annuity without the tax being first deducted, there was no rule of law to prevent effect being given to that intention. The question, therefore, in every case is one of construction of the language of the will."

Numerous cases have been decided upon words in wills as to what is and what is not sufficient to pass an annuity free of income tax. It has been decided that if the annuity is directed to be payable without any deduction whatever, or if the words were a clear yearly sum free from all deductions and abatement whatsoever, such a gift in those terms is not sufficient to give to the legatee the income tax in addition, but he must bear his own income tax. On the other hand, it has been determined more than once that if a testator uses language in his will which shows that when he uses the word "deductions" he intends to include income tax as a deduction, then the gift will be free of income tax—as, for example, in *Turner* v. *Mullineux* (2), where there was a gift to a widow of an annuity out of rents and profits free from income tax or any other deduction; so that the testator showed that he treated, for the purpose of his will, income tax as a deduction. In the latter part of the will there were gifts to daughters of other annuities free from all deductions, and it was held that all the annuities were free from income tax. That was because the testator had shown on the face of the will that the meaning he attached to the word "deductions" in his will extended to and included income tax.

In the present case we have the words "free of all duties." In my opinion that expression does not extend to and include income tax. What the testator gives to the annuitant is this annual sum free of all duties in the sense and meaning of all death duties—that is to say, all duties that are payable by reason of this beneficial

(1) 21 Ch. D. 108.

(2) 1 J. & H. 334.

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PRATT *v.* GAMBLE.

disposition that he makes of some part of his property; but the annuitant taking an annuity free of all duties is not entitled to claim also the income tax upon it: he must pay his own income tax. For these reasons I am of opinion the judgment of the Court below was right and the appeal fails.

BANKES L.J. I agree, and have nothing to add.

WARRINGTON L.J. I also agree. The question is purely one of construction as to what is meant in this will of the testator by the gift of an annuity "free of all duties." The testator uses the same expression wherever he desires to make a bequest, of whatsoever nature, free from duties. He gives in the early part of his will many legacies, all of which are given free of all duties. There can be no question as to what is meant there; but in clause 5, for example, he gives a number of annuities free of all duties. Now, if the present appellant is right, all those annuities are payable free of income tax. It does not rest there, because in the trusts of the proceeds of sale and conversion of his residuary estate he directs that the trustees are to pay his funeral and testamentary expenses and debts—"and the legacies bequeathed by this my will or any codicil hereto and make provision for the payment of any annuities so bequeathed and pay the duties on any legacies or annuities bequeathed by this my will or by any codicil hereto free of duties." How can the trustees out of the proceeds of sale and conversion pay the income tax on these annuities? It is quite impossible. I need not refer to the many places in which he uses the same expression. I only point out that in dealing with the proceeds of the residue he directs annuities to be paid to his wife and to his children, in every case using the same expression, "free of all duties." We have to construe this expression as used in this will; and when a testator, sitting down to make his will, gives a legacy, whether it is a legacy of a capital sum or an annual sum, and says it is to be free of all duties what does he mean? He only means those duties which, if he did not use that expression, would be payable because it is a gift by will. With all respect, it seems to me idle to point out that in the Income Tax Acts income tax is described as a duty. Of course, it is a duty in a sense; so are the customs duties and taxes imposed on imports.

The question we have to determine is what the ordinary testator means by "duties." Can it be supposed for a moment that an ordinary person ever speaks of income tax as income duty? For these reasons it seems to me that, on the construction of this will, what the testator meant by the word "duties" is what I have said, namely, those duties that would otherwise be payable because the gift is one by will.

Solicitors: *J. Gamble; Nye, Moreton & Clowes.*

G. A. S.

Distinguished. J. W. CAFES, LTD. *v.* BROWNLOW TRUST, LTD. [1950] 1 All E.R. 894.

In re DANIEL.

DANIEL *v.* VASSALL.

[1913 D. 474.]

SARGANT J.
1917
June 5; *July* 3.

Vendor and Purchaser—Contract for Sale of Real Estate—Mortgage on Property sold and other Property—Inability of Vendor to redeem or obtain Release from Mortgage and to complete Purchase—Purchaser's Right to General Damages for Loss of Bargain.

Testator had agreed to sell real property which, with other property, was subject to one mortgage. After his death the title was accepted by the purchasers; but the mortgagees refused to release the property sold from their mortgage, and the executors of the vendor had not enough funds of the estate for redemption of the mortgage:—

Held, that the liability to the purchasers was not limited to the costs of investigating the title, but that they were entitled to general damages for loss of bargain.

In such a case the absence of wilful default and bad faith is immaterial.

Bain v. *Fothergill* (1874) L. R. 7 H. L. 158 distinguished.

ON November 5, 1912, the testator contracted with one Wood for the sale to the latter of a house for 1000*l.*, of which a sum of 50*l.* was paid as a deposit. December 21, 1912, was the date fixed for completion. The benefit of the contract was transferred by Wood to the Bristol Tramways and Carriage Company, Limited. The title to the property had not been approved by December 11, 1912, when the testator died. By May, 1913, the company had accepted the title and agreed the form of conveyance. Difficulties, however,

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arose with the testator's mortgagees, who held a mortgage for 6000*l.* on the property sold and an adjoining hotel. The mortgagees refused to join in the conveyance except with certain reservations and stipulations which the company was not bound to, and did not, accept. The company called on the testator's executors to complete the purchase, and, if necessary, to pay off the mortgagees and obtain a release of the property sold. This the executors were unable to do, owing to the position of the testator's estate. The company then gave them formal notice requiring them to complete the matter within a month, and on their failure to do so gave a further notice terminating the contract. An action had been brought by a creditor in which there was judgment for the administration of the testator's estate, and in this action the company sent in a claim for a return of the deposit with interest, 113*l.* 14*s.* 6*d.*, for costs, charges and expenses of the company in and about the purchase and 500*l.* for general damages. The Master allowed 37*s.* 1*s.* 2*d.* for the costs of investigating the title, but held that the company was not entitled to general damages. The company applied to vary the Master's certificate, claiming the general damages refused. The deposit had been returned to the company.

Maugham, K.C., and *F. K. Archer*, for the company. The testator's executors will rely on *Bain* v. *Fothergill* (1) as laying down that, where a vendor cannot complete because his title is defective, only nominal damages are recoverable by the purchaser. But the decision does not apply where, as in this case, there is a good title but the vendor does not do something which is necessary in order that he may give the purchaser a conveyance of what he has contracted to buy. In that case (2) Lord Hatherley, referring to *Engell* v. *Fitch* (3), said: "The vendor in that case was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance." *Engell* v. *Fitch* (3) and *Day* v. *Single-*

(1) L. R. 7 H. L. 158.

(2) L. R. 7 H. L. 158, 209.

(3) (1869) L. R. 4 Q. B. 659.

ton (1) are instances of purchasers recovering substantial damages where the failure to complete was not due to a defect in title. [They also referred to *Flureau* v. *Thornhill* (2), *Esdaile* v. *Stephenson* (3), *Savory* v. *Underwood* (4), *Wedgwood* v. *Adams* (5), *Townsend* v. *Champernown* (6), and *Tarn* v. *Turner*. (7)]

Fairfax Luxmoore, for the executors. The applicants are not entitled to any damages. There has been no default by them; it was the mortgagees who refused to complete. A vendor must do all he can to complete the purchase, but if he does his best he is not liable in case of his failure. He is only liable where there is wilful default or bad faith. *Bain* v. *Fothergill* (8) applies where there is either a defect in title or an inability to convey. If the executors had had the means wherewith to pay off the mortgagee, and had not done so, the estate would have had to pay substantial damages. [He referred to Dart's Vendors and Purchasers, 7th ed. pp. 992—997.]

R. H. Hodge, for the plaintiff, supported the argument of the executors.

Cur. adv. vult.

July 3. SARGANT J. This summons raises the interesting question whether a purchaser of real estate towards whom his vendor has failed to perform his contract by reason of inability to obtain a release of the property by a mortgagee is entitled to general damages for loss of bargain, or is limited to the costs incurred in investigating title. The vendor here has died since the contract, a judgment has been pronounced for the administration of his estate, and the Master has just made his first general certificate. One of the claims before the Master was that of the Bristol Tramways and Carriage Company, Limited, in respect of the failure of the testator to perform a contract dated November 5, 1912, for the sale of a house called Sion Spring House, situate at Clifton, Bristol, and adjoining an hotel called the St. Vincent's Rocks Hotel. In addition to a claim for a deposit of 50*l.* and interest thereon, which has since been satisfied by the release to them of the deposit, the Company claimed a sum of 113*l.* 14*s.* 6*d.* in respect of costs, charges, and expenses incurred by the company in and about the purchase, and also a sum of 500*l.* for general damages. The Master has allowed a sum of 37*l.* 1*s.* 2*d.* in respect of costs incurred by the company, but has taken the view that general damages are not recoverable at all, and has therefore not dealt with the evidence as to the amount, if any, of such general damage. The company are now applying to the Court to vary that part of the certificate which relates to their claim by allowing the claim for general damage.

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(1) [1899] 2 Ch. 320.

(2) (1776) 2 W. Bl. 1078.

(3) (1822) 6 Madd. 366.

(4) (1854) 23 L. T. (O.S.) 141.

(5) (1843) 6 Beav. 600; (1844) 8 Beav. 103.

(6) (1827) 1 Y. & J. 449, 539.

(7) (1888) 39 Ch. D. 456.

(8) L. R. 7 H. L. 158.

The contract was actually made with a Mr. Wood as purchaser, but the benefit of the purchase was soon transferred to the company, and they have throughout been recognized and treated as the purchasers. It fixed the purchase price at 1000*l.*, of which a sum of 50*l.* was paid as a deposit, and named December 21, 1912, as the day for completion. Some delay took place in the matter, and the title had not been approved before the testator's death, which occurred on December 11, 1912. But by the middle of May, 1913, the company had accepted the title and had agreed with the executors the form of conveyance, and the matter was ready for completion. At this juncture, however, difficulties arose in consequence of the requirements of the mortgagees of the testator, who held a mortgage for 6000*l.*, comprising both the property sold and the St. Vincent's Rocks Hotel. These properties were, to some extent, connected or intermixed physically. And, though the testator had had a quite reasonable expectation that his mortgagees would release the property sold on payment of the purchase price of 1000*l.*, yet when the mortgagees came to consider the actual terms of the conveyance they declined to join and release except with certain reservations and stipulations which the company were not bound, and were not prepared, to accept. The company accordingly called on the testator's executors to complete the purchase as arranged, and, if necessary for that purpose, to pay off the mortgagees and obtain a release of the property. But this the testator's executors were unable to do, having regard to the position of the testator's estate, which is probably insolvent. The company accordingly on June 15, 1914, gave formal notice to the executors requiring them to complete the matter within one month, and on their failure to do so gave a further notice terminating the contract, and claiming the return of the deposit of 50*l.* and damages to the extent already mentioned.

Under these circumstances it is, of course, not denied that there has been a breach, on the part of the testator and his estate, of the contract he entered into; and it is conceded on the part of his executors that, if a similar case had arisen on a sale of pure personal estate, there would have been a liability to pay general damages for the failure to procure a release of the personal estate sold from any mortgage or lien on that personal estate, whether charged thereon solely or in common with other personal estate. But it is contended on the part of the testator's executors that the case is within the rule in *Flureau* v. *Thornhill* (1) as expounded in *Bain* v. *Fothergill* (2) and followed in other cases, of which the most important for the present purpose is *Day* v. *Singleton*. (3)

That the present case is not within the exact terms of the decision in *Flureau* v. *Thornhill* (1) is clear, for that decision merely covers cases in which the incapacity of the vendor arises from a defect in his title, while here the incapacity is due, not to any defect in title, but to the refusal of the mortgagees to release, and to the pecuniary inability of the testator and his estate to pay the mortgagees off. Nor do I think that the case is within the spirit of the rule in *Flureau* v. *Thornhill.* (1) For, as is pointed out by Lindley M.R. in *Day* v. *Singleton* (4), it is an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country. Now there is no special difficulty in obtaining a release of real estate that is in mortgage. All that is required in general, and all that was requisite here, was to pay off the mortgage or a sufficient part of it to satisfy the mortgagees; and but for the lack of pecuniary means the testator and his estate were in a position to force the concurrence of the mortgagees. And, this being so, a further remark of Lindley M.R. in the same passage becomes apposite, namely, that the anomalous rule in question "ought not to be extended to cases in which the reasons on which it is based do not apply."

But it was urged by Mr. Luxmoore that the case of *Day* v. *Single-*

(1) 2 W. Bl. 1078.
(2) L. R. 7 H. L. 158.
(3) [1899] 2 Ch. 320.
(4) [1899] 2 Ch. 329.

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ton (1) was, like the somewhat similar case of *Engell* v. *Fitch* (2), a case of wilful default or bad faith, that the decision in each of these cases was really based on this fact, and that it is only in such cases that a vendor is liable. I cannot, however, think that this is so. It seems to me that these cases establish that contracts for the sale of real estate, like other contracts for sale, cast on vendors a general liability for damages for non-fulfilment of contract, subject only to an exception in a very special and limited class of cases, and that, unless a case is brought within that special class, the general rule applies. In *Day* v. *Singleton* (1) the question of the vendor's conduct was material, because, on the view taken by the Court, it prevented the case from falling within the special class by reason of the failure being due, in fact, not to inability to make title, but to deliberate abstention from doing so. But if the case, as here, is outside the special class of exception for another reason, namely, because it is a case merely of inability to convey, the question of conduct is immaterial, and the vendor is liable for non-fulfilment of contract, wholly irrespective of misconduct.

The question, indeed, seems to me to be covered by the following passage in the judgment of Lord Hatherley in *Bain* v. *Fothergill* (3), namely, "The vendor in that case"—*Engell* v. *Fitch* (2)—"was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance." Here I think that the vendor could "complete the conveyance," and could compel the mortgagees to join in the conveyance within the meaning of that passage; and that mere pecuniary inability to do so forms no better defence than it ordinarily does to a claim for a breach of contract. Can it be doubted, for instance, that in *Engell* v. *Fitch* (2), if the omission of the vendor to bring an action to dispossess the actual occupier had been due to lack of means, the decision would nevertheless have been precisely the same?

(1) [1899] 2 Ch. 320.

(2) L. R. 4 Q. B. 659.

(3) L. R. 7 H. L. 158, 209.

At one time I entertained a doubt whether some difference might not be caused in the present case by the fact that the mortgagees' refusal to release arose out of difficulties arising from or connected with the fact of the property sold being real estate, and being physically intermixed with the rest of the property subject to the mortgage. But ultimately I have come to the conclusion that this doubt is unfounded. It is pretty clear that the mortgagees' reluctance to convey in the way contracted for would have been overcome if they had been paid a sufficient part of their mortgage money to leave the remainder well secured notwithstanding that the hotel had not obtained the reservations and stipulations they were seeking. And even if this were not so, it was always open to the testator's executors, apart from their pecuniary difficulties, to pay the mortgagees off altogether. Accordingly I hold that the vendor and his estate are liable for general damages.

The parties have expressed a desire that I should not send the case back to the Master to assess the damages, but that I should deal with it myself, and they are both agreed upon this, that the time for estimating the damages was the time when the breach occurred and the contract was broken off, so that I have to consider what the real value of the property was at the time when the contract was broken.

Now the purchasers originally put the damage at 500*l.* on the ground of the special value of the purchase to the company, but they have since found that that ground is quite insupportable in law, and I think that a good deal of doubt is cast on the evidence which they have brought forward for the purpose of showing that the damages to an ordinary purchaser, apart from the special value to them, nevertheless remain at this original sum of 500*l.* I have also to take this into consideration, that the testator himself was an estate agent, and that he had held the property for a long time, quite vacant, except for one unsatisfactory tenant, and that the rent asked was only 80*l.*, which is all that I think the property can be worth; and I also have to take this into account, that his present partner considers that 1000*l.* was the real value, so that there is considerable prima facie evidence in favour of holding the sum of 1000*l.* to have been the true value.

On the other hand, there is a great deal of evidence given which shows that the value to an ordinary purchaser considerably exceeded the sum of 1000*l.*, although I am not prepared to say that it exceeded the sum of 1000*l.* by that sum which had been originally fixed on the basis of the special damage to the purchasers. Although I recognize that it is rather difficult in this case to arrive at the sum without any cross-examination of the persons who have given these fluctuating estimates of value, yet I think that the weight of evidence on the whole is in favour of the property having really been worth more than 1000*l.*; and the fact that the testator with his special knowledge sold at the sum of 1000*l.* is probably attributable to the fact that he was undoubtedly in difficulties shortly before his death, and that he was sacrificing this property, having got tired of holding it so long, at less than its real value.

Weighing one thing with another, I have come to the conclusion that the value of the property on the whole was very much nearer 1000*l.* than the sum of 1500*l.* I put the value at 1125*l.*, and accordingly I allow the company's claim at 125*l.* That being so, of course, they cannot have, in addition to the 125*l.*, the costs of investigating the title—that is, the 37*l.* odd which the Master allowed them. I do not think that was contended for by Mr. Maugham; and indeed such a claim could not be supported, for this reason, that the basis of the estimate of the loss is the difference between the value of the property if it had been conveyed to them in accordance with the contract and the price given for the property, which difference I have put at 125*l.* If they had had the property conveyed to them, of course they would have had to incur all the expense of investigating the title that they did actually incur. Therefore it is impossible to give them that sum in addition to the sum by way of general damages.

Accordingly I propose to allow the proof of the company in the administration of the estate at 125*l.*, and I give them their costs as between party and party of their claim and of their summons to vary. The costs of the claim will not, of course, now be limited to the sum of 6*l.* 6*s.* fixed by the Master, because he fixed that on the basis that the evidence of value was not relevant. So that that sum of 6*l.* 6*s.* will be struck out, and the costs will be taxed generally of the claim and of the summons to vary, and the executors will have their costs as between solicitor and client out of the estate.

Solicitors for company: *Stanley, Wasbrough, Doggett & Baker.*

Solicitors for executors: *Rider, Heaton, Meredith & Mills, for Osborne, Ward, Vassall & Co., Bristol.*

Solicitors for plaintiff: *Pilgrim & Phillips.*

F. E.

In re ELTON.
ELTON *v.* ELTON.

[1917 E. 293.]

YOUNGER J.
1917
July 20, 21, 24.

Will—Construction—Settlement—Trust for Life, Remainder for "every son and his issue male in succession, so that," &c.—Introductory Words explained by subsequent Limitations—Estate by Implication.

Testator devised real estate on trust for C. I. E. for life, and after his decease in trust for every son of C. I. E. and his issue male in succession, so that every elder son and his issue male might be preferred to every younger son and his issue male, and so that every such son might take an estate for life, with remainder to his first and every subsequent son successively according to seniority in tail male, and in default of issue of C. I. E. on similar trusts for F. E. for life and every son of F. E. and his issue male, with remainder over. Testator died in 1869. C. I. E. died in 1900, without having had issue. F. E. entered into possession as tenant for life. Plaintiff was F. E.'s eldest son, born after testator's death:—

Held, that, the initial words of the devise being merely introductory to the effective limitations which followed, the plaintiff, if he had been born in the testator's lifetime, would have been tenant for life only, but, having been born subsequently, was tenant in tail male by implication.

In re Simcoe [1913] 1 Ch. 552 distinguished.

In re Lord Lawrence [1915] 1 Ch. 129 and dictum of Lord Cozens-Hardy M.R. in *In re Hobbs* [1917] 1 Ch. 597 applied.

THE facts appear sufficiently from the head-note, and the judgment where they are more fully set out.

H. Terrell, K.C., and *Dighton Pollock*, for plaintiff. The plaintiff takes an estate in tail male (*a*) on the construction of the words:

In re Simcoe (1)—this would be so whether he was born before or after the testator's death; (*b*) according to the cy près doctrine: *Humberston* v. *Humberston* (2); *Hampton* v. *Holman* (3)—the doctrine applying as he was born after the testator's death.

[They were stopped for argument on construction.]

Greenwood, for testator's heir. *In re Simcoe* (1) has been questioned in *In re Lord Lawrence* (4) and *In re Hobbs* (5), in both which cases, especially the latter, the words are very similar to those used in the present. The plaintiff takes an estate for life only. The rule in *Shelley's Case* (6) applies only where there is nothing showing a contrary intention.

Gregson, for plaintiff's infant brother. The plaintiff takes an estate tail: *In re Simcoe.* (1)

Warwick Draper, for the tenant for life. This defendant adopts plaintiff's argument.

Archer, for trustees.

[YOUNGER J. I will try to decide without further argument.]

July 24. YOUNGER J. In this case the testator died on February 28, 1869. On his death Charles Isaac Elton, his nephew and the first tenant for life of the settled estates under his will, entered into possession of these estates, and died on April 23, 1900, without having had any issue. On his death the defendant, Frederick Elton, another nephew of the testator and second tenant for life under his will, entered into possession of the settled estates. His eldest son, the plaintiff, who is now next in order of succession, was born on January 30, 1895, long after the death of the testator. The question for decision is as to the interest which in these events the plaintiff takes in the settled estates.

The terms of the devise, so far as material, are as follows: "I devise all the freehold and copyhold manors messuages lands tenements and hereditaments to which I may be entitled at my decease with their appurtenances unto and to the use of" three persons appointed executors "their heirs and assigns upon trust for my nephew Charles Isaac Elton and his assigns during his life without impeachment of waste and immediately after his decease in trust for every son of the said Charles Isaac Elton and his issue male in succession so that every elder son and his issue male may be preferred to every younger son and his issue male and so that every such child may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male and in default of such issue in trust for my nephew Frederick son of my brother Frederick Bayard Elton and his assigns during his life without impeachment of waste and immediately after his decease in trust for every son of the said Frederick Elton and his issue male in succession so that every elder son and his issue male may be preferred to every younger son and his issue male and so that every such son may take an estate for his life with remainder to his first and every subsequent son in seniority in tail male." Then there is a similar trust in default of issue of Frederick Elton for the testator's nephew Edward Henry Elton for life and his sons and issue, followed by a similar trust in default of issue of Edward Henry Elton for the testator's nephew Arthur Bayard Elton for life and his sons and issue, and finally an ultimate legal devise in default of issue of Arthur Bayard Elton to the testator's own right heirs. It would appear, as a mere matter of words, that the interest to be taken by the plaintiff, the eldest son of the defendant the testator's nephew Frederick Elton, is an estate for life only—and the observation applies equally to the case of the sons of the testator's other nephews—"so that every such son" i.e., son of a nephew "may take an estate for his life," with remainder over. It is, however, noticeable that in later provisions of the will, those provisions dealing with the interest of Charles Isaac Elton, the testator seems to refer to the interests of those who are to follow his nephews as being interests in tail and not as interests for life at all. After the ultimate devise to his own right heirs the testator says: "I empower my trustees or trustee for the time being during the life of the said Charles Isaac Elton or during the life of any subsequent tenant in tail with his consent in writing and after his decease during the minority or respective minorities of any infant tenant or tenants *in tail* for the time being entitled under the trusts aforesaid in the discretion of such trustees or trustee to grant leases of my said devised estates . . . . provided always and

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(1) [1913] 1 Ch. 552.
(2) (1716) 1 P. Wms. 332.
(3) (1877) 5 Ch. D. 183.
(4) [1915] 1 Ch. 129.
(5) [1917] 1 Ch. 569.
(6) (1581) 1 Rep. 93b.

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I desire that the said Charles Isaac Elton and *the tenant in tail* for the time being entitled under the trusts aforesaid shall reside in and occupy the said manor house at Whitestaunton for six months at least in every year"; and "I declare that the rents and profits of my said real estate during the minority of any infant *tenant in tail* shall be invested by my said trustees until such infant *tenant in tail* shall attain the age of twenty-one years and then paid over to such *tenant in tail.*" In those provisions the testator would seem to presume that the persons taking in succession under Charles Isaac Elton would be tenants in tail, notwithstanding the fact that in the terms of the original devise to every son of Charles Isaac Elton, as to every son of a nephew in succession, there is a clear statement that every such son—including amongst them the plaintiff—is to take an estate for life only, the testator, in terms, making no mention of a tenant in tail till he reaches a nephew's grandson. It is not easy to account for this strange discrepancy. It is too much to suppose that it is due to any belief that at the testator's death, as in the event happened, neither Charles Isaac Elton nor any other of the testator's named nephews would have any issue living.

Apart, however, from these provisions, and although, as I have said, there is in these equitable devises a clear statement that "every such son"—in this case the plaintiff as son of Frederick Elton—is to take an estate for his life, it is contended that the words "in trust for every son and his issue male in succession" are sufficient to create an estate tail executed in the son—that is, in the plaintiff—and that the subsequent words "so that every such son may take an estate for his life with remainder" to his sons in tail are merely an inoperative attempt to alter the legal effect of that devise. On the other hand it is argued that the words "in trust for every son" of a nephew "and his issue male in succession"—said by the plaintiff to create a tenancy in tail mal —are merely a compendious introductory statement to that which is to succeed and that the true gift is to be found in the gift for life expanded in the "so that" clause which immediately follows.

In support of the first view *In re Simcoe* (1) is relied upon by the plaintiff. In that case—I am reading from the head note—a testator devised his real estate to the plaintiff, John Henry Walcot Vowler, a bachelor, "and his issue male in succession, so that every elder son and his issue male may be preferred to every younger son and his issue male, and so that every such son may take an estate for his life with remainder to his first and every subsequent son successively according to seniority in tail male, and on failure of such issue" over. It was held that the plaintiff, John Henry Walcot Vowler, took an estate tail. It is true that that case is superficially very like this. But there is one point of difference which, I think, makes it inapplicable to the solution of the present problem. There the "so that" clause did not either describe, nor did it purport to expand or modify, the estate originally limited to the first taker, John Henry Walcot Vowler, whatever that was, as does the corresponding clause in this will describe the estate taken by the plaintiff, the first taker. In other words, in *In re Simcoe* (1) no estate at all was under the "so that" clause given to John Henry Walcot Vowler, as there is to the plaintiff here. The estate tail originally given to Vowler remained untouched by anything in the explanatory clause. Therefore, in my opinion, *In re Simcoe* (1) is of no assistance in the present case. Its true effect is pointed out by Sargant J. in *In re Hobbs.* (2) There he says (3): "*In re Simcoe* (1) was also pressed upon me, but that case is, in my judgment, clearly distinguishable both from *In re Keane's Estate* (4) and from the present case. The rule in *Shelley's Case* (5) was not really there in question at all. There was but one single initial devise in that case to A. and his issue male, so that the whole estate devised had necessarily to pass through and be executed in A. The subsequent words could not make the issue purchasers consistently with A. being the original taker under the devise."

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(1) [1913] 1 Ch. 552.

On the other hand those who contend that the plaintiff took only a life estate under the words now being considered rely on *In re Lord Lawrence* (6), and upon the mere question of the true construction of the clause with which I am now dealing I can see no valid distinction between that case and the present. Here, as there, adopting the words of the head-note to that case,

(1) [1913] 1 Ch. 552.
(2) [1917] 1 Ch. 569.
(3) [1917] 1 Ch. 592.
(4) [1903] 1 I. R. 215.
(5) 1 Rep. 93b.
(6) [1915] 1 Ch. 129.

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I think that the "initial words of the devise were not intended to confer any estate on any one but were merely introductory to the effective limitations that follow." This view is in principle strongly confirmed by the decision of Sargant J. and the Court of Appeal in *In re Hobbs* (1) already referred to. In that case Sargant J. says (2): "It is no doubt the case that the rule in *Shelley's Case* (3) is a rule of law, and that when once a devise has been made to the heirs generally, or heirs in tail or tail male of a previous life tenant under the same instrument in the capacity of heirs, they take in the quality of heirs, that is, by descent, and not by purchase, and the estate in fee or tail is executed in the praepositus notwithstanding any contrary intention on the part of the testator or any subsequent attempt to modify or control the result of the devise. And the same rule applies to a like devise to 'the issue' or 'issue male' of such a previous life tenant, though these words are rather more flexible than the words 'heirs of the body.' But there is nothing in this rule to compel the Court to stop short at any particular point in a devise at which there is sufficient for the purpose of creating an estate tail, and to reject any subsequent part of the devise which tends to explain or interpret, not the result of the devise, but the words which denote the devisee or devisees." The learned judge then cites cases which are examples of the admissibility and effect of such words of interpretation and explanation, and then with reference to the later clauses of the will before him he uses words which may well be applied to the "so that" clause here: "But indeed the later part of the devise itself seems to me to amount to more than a mere explanation of the earlier words. I think that the later words contain the principal and crucial description of the intended devisees, and that the words 'the lawful male issue in succession' are rather of the nature of a general introductory description. The case is in this respect very similar to that decided by Astbury J. and the Court of Appeal in *In re Lord Lawrence*." (4)

It follows that if the result of this case turned only upon the true construction of the words of devise to which I have referred, the plaintiff's estate in remainder in these settled estates would be a life estate only. Moreover, I cannot doubt that if the plaintiff had been living at the testator's death his estate in the result would have been so limited, notwithstanding the possible reference to it as an estate tail contained in the later passages of the will to which reference has already been made.

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(1) [1917] 1 Ch. 569.

(2) [1917] 1 Ch. 590.

(3) 1 Rep. 93b.

(4) [1915] 1 Ch. 129.

Fortunately, however, the plaintiff was not then living. He is therefore in the position stated by Lord Cozens-Hardy M.R. in *In re Hobbs* (1) where he says: "If he" (in the present case the defendant Frederick Elton) "had had a son living at the testator's death that son would have taken merely a life estate with remainder in tail male to that son's son. In the event, however, of [Frederick] having a son born after the death of the testator, the issue of such son could not take an estate at all, as he would be the unborn son of an unborn person—that was decided in *Whitby* v. *Mitchell* (2)—and in that case the son of [Frederick] would take an estate tail by implication."

In truth the draftsman of this will when, at its date, he referred to the plaintiff's estate already given him as an estate tail prophesied better than he knew. For not by reason of what is given him in words, but by reason of events which have happened and of the rules of the Court applicable to them, the plaintiff in the result takes, in my opinion, an estate tail by implication, and I so decide.

Solicitors: *Darley, Cumberland & Co., for Tucker & Forward, Chard; Rider, Heaton, Meredith & Mills, for Osborne, Ward, Vassall & Co., Bristol; Samuel Price & Sons.*

(1) [1917] 1 Ch. 597. (2) (1889) 42 Ch. D. 494; (1890) 44 Ch. D. 85.

A. L.

Distinguished. *Re* SILVERSTON (*decd.*).
[1949] 1 All E.R. 641.

Considered. *Re* SILVERSTON. [1949] 1 Ch. 270

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July 12, 13, 17, 18, 24.

In re KING.

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[1917 K. 23.]

Will and Codicil—Construction—Legacies to Persons in Testator's Service at Death—Testator found Lunatic by Inquisition—Servants engaged by Committee of Person—Lapse—Legacies to Charities—Probate Action—Charities cited and not appearing—Probate granted as Term of Compromise—Assent of Attorney-General—Charities bound by Compromise.

Testator, by codicil admitted to probate under circumstances hereinafter stated, bequeathed certain pecuniary legacies to servants then in his employment and further bequeathed to "each person in my service at my death" a sum equal to one year's wages in addition to any legacy thereinbefore bequeathed as well as to the wages then due to him or her. He gave a number of legacies to charities, and the residue of his estate upon trust for division among institutions to be selected by his trustees. On March 21, 1908, he was found lunatic by inquisition, and the official solicitor was appointed committee of his person. Shortly afterwards he was removed to an establishment maintained for him under the authority of the Master in Lunacy, and O. was appointed by the committee of the person to have charge of the establishment, with authority to engage other assistance, under which O. engaged an attendant, an assistant attendant, coachman, and other servants. The testator died in 1915, and shortly after his death one of the defendants commenced an action in the Probate Division, claiming as heir-at-law and sole next of kin that the Court should pronounce against the codicil, and for the will and five earlier codicils under which the residue would be undisposed of. The Attorney-General was a party to the proceedings, and a citation was issued to the charities, which, however, did not appear. Ultimately a compromise, signed by the Attorney-General and other counsel, was arrived at between the parties present at the hearing, under which the sixth codicil was admitted to probate on the terms that the will and all six codicils were to be admitted to probate; that the beneficiaries under the sixth codicil were to relinquish in favour of the plaintiff in that action one third of their legacies under that codicil; and that the plaintiff was to receive one third of the residue of the estate in addition to the amounts relinquished in his favour. The charities were at once informed of the compromise and no complaint was ever made:—

Held, that O. and persons engaged by him in relation to the establishment were not in the testator's "service" within the meaning of the sixth codicil, and that the bequests of sums equal to one year's wages did not therefore take effect in their favour.

In re Lawson [1914] 1 Ch. 682 considered.

Held, also, that, the compromise having been assented to by the Attorney-General on behalf of the charities, absent by their own choice, they were bound by it.

Statement of Sir J. Romilly M.R. in *Ware* v. *Cumberlege* (1855) 20 Beav. 510 as to the position of the Attorney-General in charity matters applied.

But, even if they were not bound, yet, as they claimed to stand by the probate of the sixth codicil, not to set it aside, and as it was only admitted to probate as part of the compromise, they must, if they wished to take advantage of the agreement, bear their portion of the burden of it.

Remarks on the difficulty of working out in the Chancery Division compromises made in the Probate Division.

ADJOURNED SUMMONS.

By a sixth codicil dated January 22, 1908 (which was admitted to probate under the circumstances hereinafter stated), the testator, after bequeathing certain pecuniary legacies to certain servants then in his employment, bequeathed " to each person in my service at my death a sum equal to one year's wages in addition to any legacy hereinbefore bequeathed as well as to the wages then due to him or her." He gave a number of charitable legacies, and the residue of his estate upon trust for division among four charitable institutions to be named by his trustees. On March 21, 1908, the testator was found lunatic by inquisition, and on April 7, 1908, the official solicitor was appointed committee of his person. In the autumn of the same year the testator was removed to an establishment at Torquay maintained for him under the authority of the Master in Lunacy, and one Oldfield was appointed by the committee of the person to have charge of the establishment, with authority to engage such other assistance as might be necessary, under which Oldfield engaged an attendant, an assistant attendant and groom, a coachman, and other servants. The testator died on March 5, 1915, and on March 12, 1915, one of the present defendants commenced an action *King* v. *Jackson* [1915 K. 256] in the Probate Division in the matter of the testator's estate claiming as heir-at-law and sole next of kin that the Court should pronounce against the sixth codicil, and for the will and five earlier codicils, the effect of which, if admitted to probate by themselves, would be that the residue, instead of going to unnamed legatees, would be undisposed of. In those proceedings citations to see proceedings in the action were issued to the charities, and the Attorney-General was a party to the proceedings. After a six days' hearing with a special jury in March, 1916, a compromise was arrived at between the parties present at the hearing. The charities, though cited, did not appear, and the compromise was arrived at in their absence so far as their actual presence was concerned. The compromise was signed by the Attorney-General and other counsel. Under the terms of it probate was to be decreed of the will and six codicils, the beneficiaries under the sixth codicil, including the named charities, were to relinquish in favour of the plaintiff one third of the amounts devised or bequeathed to them, and the plaintiff was to receive one third of the residue of the estate in addition to the amounts relinquished to him. The judge accordingly pronounced for the will and six codicils. Probate was granted on July 14, 1916. The terms of compromise were filed and made a rule of Court. So soon as the compromise was arrived at steps were taken to inform the charities of what had been done. No complaint or remonstrance was made on behalf of any of the parties up to the present proceedings, which were commenced on January 11, 1917, by originating summons taken out by the trustees, asking (inter alia) (1.) whether the bequest in favour of each person in the testator's service at his death of a sum equal to one year's wages took effect in favour of Oldfield and the servants engaged by him and employed in relation to the establishment at Torquay at the time of the testator's death; and (2.) whether the charities were entitled to payment in full of the legacies bequeathed to them under the sixth codicil, or whether, having regard to the fact that the Attorney-General was a party to the probate action and compromise, they were bound by, and must submit to, the terms of the compromise, though made in their absence, under which the sixth codicil was admitted to probate.

On the first point

Stamp, for the trustees.

Austen-Cartmell, for the Attorney-General. The bequests to persons in the testator's "service" at his death failed as to Oldfield

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and the servants appointed by him—certainly as to Oldfield. These persons were in the service of the Court rather than of the testator.

H. Terrell, K.C., and *Percy Wheeler*, for the plaintiff in the probate action, supported the same argument. Oldfield and the servants engaged by Oldfield were appointed directly or indirectly by the committee of the person. There is this distinction between an appointment by a committee of the person and an appointment by the committee of the estate—that in the latter case the committee contracts in the name of the lunatic, but in the former he does not. The committee of the person is not liable to account for the allowance made to him for the maintenance of the lunatic: *In re French.* (1)

Owen Thompson, for the defendant Oldfield and other servants. All these persons were in the testator's "service" at his death. If they were not in the testator's service, in whose service were they? It is contended that they were in the service of the committee of the person; but if the committee died, would that amount to a dismissal, or if the committee made a will containing a similar clause, would these persons be entitled to claim under it? The answer in each case must be No. The true view is that in engaging these persons the committee or Court was acting pro hac vice as agent for the testator. In *In re Lawson* (2), where the servant had been engaged by a receiver appointed under s. 116 of the Lunacy Act, 1890, the point now contested was assumed without argument in favour of the servant. The bequest can also be fairly read as a bequest to each person in attendance on the testator at the time of his death.

YOUNGER J. read the bequest in the sixth codicil and stated the facts, and continued: The question is whether the servants in attendance on the testator at his decease took the benefit of the bequest. In fact one of them, Mr. Oldfield, was appointed directly by the committee of the person of this testator to look after the testator's household, while the others, some of whom discharged very intimate personal services to the testator, were appointed by Mr. Oldfield; but none of them were in any sense

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(1) (1868) L. R. 3 Ch. 317.

(2) [1914] 1 Ch. 682.

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appointed by the testator himself, nor were any of them in any other sense than just stated in his service at the time of his death. The question is whether any of them can claim this legacy as being a person in the testator's service at his death. In my opinion they cannot. I think these persons were either in the service of the committee of the person or, as Mr. Austen-Cartmell suggested, in the service of the Court, and I do not think there was at the testator's death any person who was in his service within the meaning of the codicil. The committee of the person under a scheme in lunacy was apparently allowed a certain sum by means of which he was to provide for the comfort of the testator, including in that the engagement of a proper staff of servants; and Mr. Terrell cited an authority which shows that the committee of the person is not liable to account for the actual disposition of moneys placed in his hands for the purpose so long as he discharges the duty of maintaining the lunatic, which it is not in dispute has been properly performed in the present case. It appears, therefore, that these persons cannot be said to have been in the service of the lunatic as persons either appointed or paid by him. They were in fact paid by the committee of the person out of the money allowed to him for that and other purposes, and were also appointed mediately or immediately by him.

In those circumstances it appears to me that these persons do not answer the description of persons " in my service at my death " unless the words can be read as meaning persons " attending upon me at my death " ; and it has been suggested that they may bear that meaning. But, remembering that the testator was of sound mind when he made this codicil, and that he made it presumably with reference to servants who had been engaged and would in ordinary course continue to be engaged by himself, I see no reason for extending the ordinary meaning of the words which he used. In these circumstances I am of opinion that neither Oldfield nor any of the other servants is entitled to the benefit of the legacy. I ought perhaps to refer to the decision of Eve J. in *In re Lawson.* (1) The gift there was " to each of my domestic servants who shall have been in my service for two years prior to my decease," and Eve J. did allow the legacy to a male nurse who was first engaged by a receiver of the testator's property appointed under s. 116 of the Lunacy Act, 1890. It is, however, obvious from the report either that there were special circumstances which enabled the judge to hold without question that the servant in that case was in the service of the testator, or that the point was not either taken or pressed in argument. It is certainly not discussed in the judgment, and I do not think that the decision of Eve J. can be considered as an authority either one way or the other on the point which has been now definitely argued before me. Moreover, the difference between a receiver and the committee of the person may be, and I think properly is for this purpose, very marked. The answer to this question raised by the summons will accordingly be that the bequest did not take effect in favour of Oldfield or in favour of any of the other persons who claim it.

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(1) [1914] 1 Ch. 682.

On the second point:

Stamp, for trustees.

Owen Thompson, for charities. The charities, though cited in the probate action, did not appear and are not bound by the compromise: *Wytcherley* v. *Andrews* (1); *Ritchie* v. *Malcolm.* (2) There is in the sixth codicil a valid testamentary instrument, and the charities claim under it independently and irrespective of any compromise.

H. Terrell, K.C., and *Percy Wheeler*, for plaintiff in the probate action. The charities are estopped by their conduct, apart from being bound by the compromise: *In re Lart.* (3) But they are also bound by the compromise. Originally charities were mostly ecclesiastical. The King, as parens patriae, administered them through his Chancellor or Vice-Chancellor. This was modified by statute, and the King was represented by his legal officer, the Attorney-General, who appeared before the judge who took the Chancellor's place. The rule as to his appearance in charity cases was considered by Sir J. Romilly M.R. in *Ware* v. *Cumberlege.* (4) Where a charity is concerned he always does, or has a right to, appear. He can bind a charity even if the charity objects, if the Court approves. He can certainly bind a charity in its absence. He represents a charity which is absent. He has power, if he thinks that a proposal to arrange matters, though not conceding all a charity is entitled to, will on the whole be more beneficial to the charity than long and contested litigation, to accept it and carry it into effect: *Attorney-General* v. *Exeter Corporation* (1); *Attorney-General* v. *Boucherett.* (2) Many cases, never contradicted, show his duty and his right: *Attorney-General* v. *Carlisle Corporation.* (3) The foundation of it all is that he acts for the King, who controls all charities: *Attorney-General* v. *Brown.* (4) The charities here are bound.

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(1) (1871) L. R. 2 P. & M. 327.
(2) [1902] 2 I. R. 403.
(3) [1896] 2 Ch. 788.
(4) 20 Beav. 503, 510.

Austen-Cartmell, for the Attorney-General. The case for the charities has been put too high. Where an action is brought by the Attorney-General at the relation of A. and B. the relators are really the plaintiffs, and the Attorney-General does not actually take part.

[YOUNGER J. Having issued his fiat he does nothing more.]

But in the case of charities he does more—he keeps an eye on them. He is really the beneficiary of all charities. If a charity improperly enters into a compromise he can intervene by action against the charity officials. He cannot bind a charity by compromise behind its back, but he can bring an action to ask the Court to sanction a compromise. In the present instance the Probate Court seems to have gone too far. But that is rather in appearance than in fact. Immediately after the compromise was entered into notice of it was given to the charities, and none of them objected. Now at the end of a year and three-quarters objection is made. The Attorney-General, the beneficial legatee while the charities are legal legatees, has the right, by virtue of his beneficial interest, to say that the legal interest is bound: *In re Cardwell* (5); *In re Faraker.* (6) He is ordinarily entitled to costs out of the charitable fund like any other beneficiary, but if he feels he has made a mistake he has the tact not to ask for them. In the special circumstances of this case the charities ought not to be allowed to take the benefit of the compromise without bearing the burden of it. [He also mentioned *Attorney-General* v.

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(1) (1827) 2 Russ. 362, 370.
(2) (1858) 25 Beav. 116, 121
(3) (1831) 4 Sim. 275, 278.
(4) (1818) 1 Swanst. 265, 290.
(5) [1912] 1 Ch. 779, 780, 783.
(6) [1912] 2 Ch. 488, 492.

Brettingham (1), where Lord Langdale M.R. referred approvingly to *Attorney-General* v. *Exeter Corporation.* (2)]

[YOUNGER J. In practice, of late, frequently compromises have been made in the Probate Division which, according to our rules in this Court, are difficult to work out. But the question of recognizing them has never, I think, actually arisen. The charitable legacies must abate. I will set out my reasons in writing.]

YOUNGER J. The questions that I have now to determine are whether the charities are bound by the assent of the Attorney-General which was given on their behalf, and whether, even if they were not so bound, it is open to them in these proceedings to repudiate without any cause shown the compromise come to in the Probate Division. With regard to the first question, I think the most authoritative statement as to the position of the Attorney-General in such matters is to be found in the judgment of Sir John Romilly M.R. in *Ware* v. *Cumberlege.* (3) Having been asked by the Attorney-General of the day to state what was the practice with regard to the Attorney-General's intervention in charity matters, the Master of the Rolls made this statement (4): "It is difficult to lay down any general rule, which shall be adapted to every case; there must be a great deal of discretion in these matters. The general principle which regulates them I take to be something of this description :—the Attorney-General represents all absent charities, and it is sufficient to have him here to represent all absent charities. But absent charities may obviously be of two different characters : they may either be under gifts to specified individual charities, or to charity generally. In case the gift is for charity generally, no one can represent it but the Attorney-General, and he must be here to represent such general charities. When there are specified individual charities, then the Attorney-General's presence is not universally necessary; but it is required by the Court upon various occasions, as, for instance, where any rules are required for the regulation of the internal conduct of the charity itself, such as the establishment of a scheme and the like;

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(1) (1840) 3 Beav. 91, 95.
(2) 2 Russ. 362, 370.
(3) 20 Beav. 503.
(4) Ibid. 510.

there the Attorney-General is necessary for the purpose of aiding and assisting the Court in directing and sanctioning the general system and principle that ought to govern charities of those descriptions. But there are other cases where there is no question as to the conduct or management of the charities, but only whether the charity is entitled to a particular legacy or not. In those cases, the Attorney-General is rather in the nature of a trustee for those charities, and the Court prefers having before it the charities beneficially interested, for the purpose of putting their interests before the Court in the light which they consider most favourable to them. In those cases I think it preferable that the charity itself should appear, rather than that the Attorney-General should represent it. This appears to me to be one of that latter class of cases, and therefore it would be better that the charity should appear. Having stated that as my general view of the case, it is very obvious, as counsel will see, that there may be mixed cases in which it is impossible to lay down a rule beforehand, and in which the Court must act on the matter before it in such manner as, according to the best exercise of its discretion and judgment, it may think best calculated to promote justice."

It appears to me to follow very clearly from these observations of Sir J. Romilly that in a case like the present, where the charity was in fact cited, as it was properly cited, but did not think fit to appear, and the Attorney-General did remain a party to the proceedings, as he was properly a party to the proceedings, certainly there was the same power and authority left in him to make any arrangement by way of compromise, or otherwise, with regard to the absent charity, which had been cited, but did not appear, as there would have been to approve such a compromise had it been made in the presence of that charity. That was, of course, what did in fact happen. These respondents were cited. They did not appear. The Attorney-General did, in the compromise which was arrived at, take upon himself the duty of protecting not only the charitable purposes indicated—the unnamed charities interested in residue—but he also took it upon himself to protect and bind the interests of the charities which were specially named as pecuniary legatees, and he compromised the proceedings on behalf of all. That compromise was duly notified to all of these charities, and no objection was ever taken (nor is now taken) to the propriety of that compromise. Accordingly it appears to me clear that it is binding upon them all.

But I desire, if I may, to deal with this case on broader grounds, and I will assume, contrary to what I have stated to be my opinion, that the Attorney-General's consent in this case did not bind the absent charities. Now there is authority for the proposition that in a probate suit it is not necessary for a person to be a party to it in order to be bound by its result. But there is also clear authority for the proposition that that rule, otherwise apparently a general rule, has no application to a case where the parties to the proceedings think fit to take upon themselves the responsibility of compromising it. An absent party, who would include one that had been cited but did not appear, is not, it appears, bound by a compromise of the proceedings made subsequently in the action. That principle is laid down very clearly by Lord Penzance in *Wytcherley* v. *Andrews* (1), where he says: "There is a practice in this Court, by which any person having an interest may make himself a party to the suit by intervening; and it was because of the existence of that practice that the judges of the Prerogative Court held, that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to re-open the case. That principle is founded on justice and common sense, and is acted upon in Courts of Equity, where, if the persons interested are too numerous to be all made parties to the suit, one or two of the class are allowed to represent them; and if it appears to the Court that everything has been done bona fide in the interests of the parties seeking to disturb the arrangements, it will not allow the matter to be re-opened. That has been undoubtedly the rule also in the Prerogative Court, but I do not find that it has ever been applied to cases of compromise. It is one thing to say that a person who stands by and lets another fight his battle, must be bound by the result of the contest; and it is quite another thing to say that, without any notice that there was going to be a compromise, and without any knowledge that the suit was not proceeding to its natural end, he must nevertheless be bound by any agreement which the parties to the suit may choose to enter into. That would be carrying the rule very far indeed. I find no authority for carrying it to that length, and I am not disposed to extend it beyond the limit within which it has been confined in former cases." Accordingly, as a result of that opinion of Lord Penzance, in that case one of the next of kin of a testator, who had not been a party to previous proceedings in which an application to set aside his will had been dismissed and the will had been admitted to probate by a compromise made with one of the next of kin who was a party to the proceedings, was permitted to reopen the proceedings and to claim, notwithstanding the probate, which was the result of that compromise, to have it set aside on cause shown. That principle was also followed in the case of *Ritchie* v. *Malcolm.* (1) The result appears to be that the parties in a case like the present who were not present in the Probate Division may seek to recall the probate which was the result of a compromise there if they have ground for having that probate set aside.

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(1) L. R. 2 P. & M. 327, 328.

The position of the charities here, however, is very different. Their claim is to stand by the probate, not to have it set aside. The sixth codicil, they say, was proved in solemn form, and by virtue of the order which followed thereon they are entitled to receive everything which in due course of administration that codicil gives them, free from any obligation to submit to a deduction made under some agreement to which they were not parties; and that, although upon the propriety or even the necessity of that agreement they offer no criticism. The position of course is plausible; it is not, however, I think, tenable. It is not, to my mind, true to say that the codicil was admitted to probate merely on the evidence adduced of due execution. It was, in fact, so admitted as one term of an agreement, without which probate would at the best have followed only after prolonged litigation, and at the worst might never have followed at all. In truth and in substance, therefore, any one now seeking to claim under that codicil, as proved, is claiming the advantage of that agreement, and it would appear prima facie to follow that, if he takes that advantage, he

(1) [1902] 2 I. R. 403.

must submit to bear his assigned portion of the burden by means of which that advantage was secured. And if it be said that in a case like the present in which the claimants have no interest to recall the probate it would result from this view that they in effect are held bound by a compromise to which they were no party notwithstanding Lord Penzance's decision to the contrary, the answer is that is not so. The only effect of Lord Penzance's principle is that a person not bound by a compromise, who is dissatisfied with the act of the Court which follows thereon, is at liberty to institute fresh proceedings and by the strength of his own case to have that act of the Court recalled. Lord Penzance did not decide that that act would be recalled without more so soon as it appeared that all persons interested in the estate were not bound by the compromise upon which it followed. It stands until, on cause shown, it is recalled. So here, even if it is said that the charity having no interest to recall the probate must take it as they find it, and if they seek to claim under it must submit to bear their assigned burden, that does not mean that, if they are prepared affirmatively to establish either that the particular burden assigned to them was unfair or that it should not have been imposed upon them at all, they are without remedy. If, for instance, in the present case the charity were as against the plaintiff in the probate action to establish affirmatively that the testator was of sound disposing mind at the date when he executed his sixth codicil, or if they were able to show—I do not think they could—that, even if he was not, the payment to the plaintiff in that action by way of compromise should have been made exclusively out of residue and that no part of it should have been charged against their legacies, I see no reason why in a proper proceeding they should not do so and why they should not, if successful, receive in the result their legacies intact. But that burden is upon them, and, until assumed and discharged, they must bear their part of the compromise, just as they would have had, in effect, to do, if their position had been that they took nothing under a probate following a compromise by which they were not bound. In that case they could claim nothing from the estate until they had successfully asserted their right to have that probate recalled and have their own title established. I would

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only add that this conclusion is, I think, supported by such a decision as that of Chitty J. in *In re Lart*. (1)

This is not the first time in which this Court, as the Court of administration, has found it difficult to work out compromises of probate proceedings entered into without full regard to the interests of absent parties. I hope that the fact that this difficulty has not in the present case, even as regards the individual legatees, materialized will be no encouragement to increase the number, already large enough, of such arrangements.

Solicitors: *Hargreaves & Crowthers, for Johnson & Tilly, Lancaster; G. & G. Keith; Mann & Crimp, for Kitsons, Hutchings, Easterbrook & Co., Torquay; Treasury Solicitor.*

A. C. and A. L.

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In re PLUMMER.

Solicitor—Taxation—Order of Course—Prohibition against Commencement of Proceedings by Solicitor pending Reference — Motion to discharge—Delay—Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 37—*Rules of the Supreme Court*, 1883, *Order* LXX., *r.* 2.

In February, 1917, the client obtained an order of course to tax his solicitor's bill on application made within one month from delivery. The order contained no submission to pay and no direction for delivery of papers, but contained an unqualified prohibition against the commencement of any proceedings by the solicitor in respect of the bill pending the reference. A reference was made to a taxing Master, but the client did not proceed further under the order, and the solicitor alleged on oath that he believed that the client obtained the order with the sole view of delaying payment and had no intention of proceeding under the order. The solicitor now moved to set aside the order for irregularity on the ground that the words restraining the commencement of proceedings by the solicitor were erroneously inserted, or in the alternative that these words might be struck out, or in the further alternative that, notwithstanding the order, he might be at liberty to commence proceedings against the client:—

Held, that the application in the circumstances was not too late.

Held, also, that the unqualified prohibition against the commencement of proceedings by the solicitor pending the reference was in accordance with the established form of order on the client's application within one month from delivery and that the order could not be set aside for irregularity; but that, having regard to the uncontradicted evidence that the client was using it for the purpose of delay, the Court, under its inherent jurisdiction to prevent abuse of its orders, was entitled to direct, as it did, that unless the client obtained an appointment to tax within fourteen days the order should be discharged.

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(1) [1896] 2 Ch. 788.

The form of order approved in *In re Brockman* [1909] 2 Ch. 170, 177, and the forms in Seton on Judgments, 7th ed. pp. 254, 255, discussed.

MOTION.

The following statement of facts is taken from his Lordship's written judgment:—Mr. Plummer acted as solicitor for Mr. Oswald Vernon Forbes from September, 1907, to April, 1916. In January, 1917, the solicitor delivered to the client his bill of fees and disbursements together with a cash account showing a balance of 349*l.* 4*s.* 9*d.* due to him. On February 27, 1917, on a petition presented by the client alleging that the solicitor had on or about January 27, 1917, delivered his bill of fees and disbursements, which the client was advised ought to be taxed, an order of course was made referring it to the taxing Master to tax and settle the bill; and amongst other things it was thereby ordered "that no proceedings be commenced against the petitioner in respect of the said bill pending this reference." The order contained no submission by the client to pay what should be found due and no direction for delivery up of the client's papers by the solicitor.

It appears from the affidavit of the solicitor that the first intimation he received that any order for the taxation of his bill had been made was on March 9, 1917, when he was informed of that fact by his own solicitor. It was then also brought to his notice that a reference had been taken before Mr. Taxing Master Bloxam.

Negotiations between the parties appear then to have taken place with a view to a proposal being made on behalf of the client which might obviate the necessity of taxation, and on May 14, 1917, a copy of the bill was lent by the solicitor acting for Mr. Plummer to Mr. Grice-Hutchinson, the solicitor acting for the client, with a letter dated May 14, 1917, to the following effect: "I have written my client that I have lent you my copy of the bill that you may go through same and return it to me within fourteen days, by which time it is possible you may be able to make a proposal which may obviate the necessity of taxation. I shall be glad if you can expedite the matter as much as possible, as there has been so much delay." On June 5 the following further letter was written to Mr. Grice-Hutchinson: "On the 14th ulto. you will remember I lent you my copy of the bill of costs herein, which was to be returned within fourteen days. Please let me have it back at once. My client is very dissatisfied with the unnecessary delay in this matter, and therefore I must ask you to deal with it not later than Thursday, as otherwise I shall have to move in the matter myself."

In response to that letter the copy bill of costs was returned, but no proposal for settlement was made, nor did the client proceed with the taxation under the order of February 27, and it is not suggested on his behalf that beyond obtaining a reference to the taxing Master he has taken any step whatever under that order, nor has he paid or tendered any part of the bill. In these circumstances on July 17, 1917, the solicitor served the present notice of motion upon the client asking that the order of February 27, 1917, might be discharged as irregular on the ground that the words which I have read from that order were erroneously inserted in it, and asking in the alternative that the order might be corrected by striking these words out, or in the further alternative that, notwithstanding the order, the solicitor might be at liberty to commence proceedings against the client in respect of the bill referred to in the order, or that such other order might be made in the premises as to the Court might seem fit. In support of that motion Mr. Plummer has filed an affidavit in which, after setting forth the facts as I have stated them, he says in paragraph 7: "I am advised that the order as drawn is in an incorrect form. I verily believe that the order was obtained and drawn up in the form in which it now appears upon the instructions of the said Oswald Vernon Forbes and with the sole view of delaying my obtaining payment of the amount due to me, and also that the said Oswald Vernon Forbes has no intention whatever of proceeding under the said order." The client has not thought fit to traverse or deny that allegation.

J. W. Manning, for the motion. The order is irregular in containing an unqualified prohibition against the commencement of proceedings by the solicitor. Two forms are given in Seton on Judgments, 7th ed., pp. 254, 255, of orders of course for taxation on the client's application within one month from delivery which are stated to have been approved by Cozens-Hardy M.R. The first of these forms, containing an order for delivery of papers and a submission to pay, contains also an unqualified prohibition against the commencement of proceedings by the solicitor pending the reference similar to the prohibition in the present case; but the second form, which is applicable to the present case, where there is no submission to pay and no order for delivery of papers, omits altogether the prohibition against the commencement of proceedings by the solicitor. It is true that the form approved by the Court of Appeal in *In re Brockman* (1) contains such a prohibition, but with the qualification that the Master is to make his certificate within one month (unless he extends the time), or the order is to be of no effect; and that qualified prohibition is also contained in Form No. 4 in Seton, 7th ed. p. 256, for use on the client's application after the expiration of one month, but before the expiration of twelve months from delivery of the bill. The prohibition, therefore, in the present case ought either to be omitted altogether, as in Form No. 2 in Seton, or if inserted ought to be in the qualified form in *In re Brockman.* (1) Moreover, on the uncontradicted evidence in the present case, the client is only making use of the order for the purpose of delay, and if necessary I ask the Court in any case to deal with the matter under its general jurisdiction so as to prevent an abuse of its own process.

W. F. Swords, for the client. First, this application is made too late. By Order LXX., r. 2, of the Rules of the Supreme Court, 1883, an application to set aside any proceeding for irregularity must be made within "reasonable time," and in *In re Hilliard* (2) a delay of two months was held to be unreasonable

[YOUNGER J. That was a motion by the client to discharge an order obtained by the solicitor. In the present case the client is himself responsible for the delay in proceeding under the order.]

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(1) [1909] 2 Ch. 170, 177.

(2) (1891) 35 Sol. J. 698.

It was open to the solicitor to obtain an appointment to tax under the order: *Shirreff* v. *Gresley* (1); Cordery on Solicitors, 3rd ed. p. 332.

Secondly, on the merits the order is in accordance with the practice of the Court and the terms of s. 37 of the Solicitors Act, 1843, under which the client applying for taxation before the expiration of one month from the delivery of the bill is entitled to an unqualified prohibition against the commencement of proceedings by the solicitor. The language of the section is peremptory, namely, that the "Court or judge making such reference shall restrain" the solicitor from commencing any action or suit pending the reference, whereas when the application is made after the expiration of one month and before the expiration of twelve months from the delivery of the bill the language is altered, namely, that the Court or judge "may restrain" the solicitor from commencing any action or suit pending the reference "upon such terms as shall be thought proper." The difference in language explains the different forms in use prior to *In re Brockman* (2), according as the client's application was made before or after the expiration of one month, the one form omitting and the other form containing the qualification that the taxing Master is to make his certificate within one month (unless he extends the time), or the order is to be of no effect, that being a condition imposed by the Court in the exercise of its discretion. It is true that the form given in *In re Brockman* (2) contains a similar qualification, but it is submitted that that addition crept in per incuriam. It was not intended by the Court of Appeal in *In re Brockman* (2) to alter the old form in this respect, according to which the client was entitled to an absolute prohibition, and the point was not referred to in the judgments, which dealt with the question of statute-barred costs and the submission to pay; and moreover the old distinction is adhered to in Forms 1 and 4 in the last edition of Seton, 7th ed. pp. 254, 256, which were approved by the Master of the Rolls after the decision in *In re Brockman* (2), to which he was a party. Form No. 2 in Seton is obviously wrong if it is intended to omit altogether any prohibition against the commencement of proceedings by the solicitor. The order in the present case is therefore perfectly regular and should stand. *In re Robertson* (1) shows that there was no default on the part of the client in not serving the solicitor with the order.

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(1) (1835) 4 Ad. & E. 338.

(2) [1909] 2 Ch. 170.

J. W. Manning in reply. There are practical difficulties in the way of the solicitor himself proceeding under the order when obtained by the client. Thus, the taxing Master is to tax the bill itself and not a copy. Further, before giving an appointment to tax the Master may require a deposit on account of fees: Annual Practice, 1917, p. 1288, which it would fall on the solicitor to pay.

[YOUNGER J. said that before delivering judgment he would consult the senior taxing Master.]

Cur. adv. vult.

July 27. YOUNGER J. delivered a written judgment in which he stated the facts, and continued: This motion raises a nice question as to the proper form of an order of course for the taxation of a solicitor's bill obtained by the client in pursuance of s. 37 of the Solicitors Act, 1843, within one month of the delivery of the bill. That section, with regard to such an order, provides in par. 2 of the section as printed in Cordery on Solicitors, 3rd ed. p. 418, and in express terms, that the Court or judge making the order "shall restrain the solicitor . . . . from commencing any action or suit" touching his demand pending the reference to taxation; and the actual words contained in that paragraph of the section may be usefully contrasted with those in the third or succeeding paragraph, by which the powers of the Court are conferred in relation to an application for a reference to taxation of a bill which shall not have been made within a month of delivery. There the words are that the Court or judge "may restrain" the solicitor—the direction, it will be seen, is not imperative—"from commencing or prosecuting any action or suit touching such demand pending such reference"; and then follow the important words, "upon such terms as shall be thought proper."

Now it is, I think, quite clear that prior to the decision of the Court of Appeal in *In re Brockman* (2) it was the universal practice in orders of course obtained by the client within one month of the delivery of the bill to impose an unqualified prohibition against the commencement of proceedings in the terms of the order in

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(1) (1889) 42 Ch. D. 553, 555.

(2) [1909] 2 Ch. 170.

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the present case. It appears that this practice originated at least as early as in the orders made in pursuance of the statute 2 Geo. 2, c. 23, by s. 23 of which it was provided that pending such reference and taxation no action should be commenced or prosecuted touching such demand—words substantially repeated in the second paragraph of s. 37 of the Act of 1843, by which the statute of George II., which had been made perpetual by 30 Geo. 2, c. 19, was repealed.

And that this was the universal practice is not only indicated by the forms in the 5th and earlier editions of Seton, but is also confirmed by the observations of Romer L.J. in the case of *In re Macintosh and Thomas.* (1)

It is also, I think, equally clear that before the case of *In re Brockman* (2) the form of prohibition which is to be found in *In re Macintosh and Thomas* (1) was in practice used only in orders under the third paragraph of s. 37—that is to say, in orders on an application made after the expiration of a month from delivery. These words in their latest form were as follows: "That no proceedings be commenced against the petitioner in respect of the said bill pending this reference, but the Master is to make his certificate in a month (unless the said Master shall extend the time to enable him to make his certificate), or this order is to be of no effect." Moreover, that this was no accident is shown by a reference to the occasion on which these words were first used. The note to *In re Bromley* (3) shows that similar words first appeared in an order of course for the taxation of a solicitor's bill applied for after the expiration of a month from its delivery in lieu of the provision which had at an earlier date been insisted upon, namely, that the client before obtaining such an order should be required to pay into Court the amount of the bill. The original form of words was the following: It is ordered "that no proceedings at law be commenced against the petitioner pending the reference, but the petitioner is to procure the Master's report in a month (unless the Master shall certify that further time is necessary to enable him to make his report), or the order is to be of no effect."

So far, then, the practice was clear. The absolute form was used in orders for taxation on applications made within a month from delivery of the bill; the qualified form was used in orders on such applications made after the expiration of that month.

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(1) [1903] 2 Ch. 394, 408.

(2) [1909] 2 Ch. 170.

(3) (1844) 7 Beav. 487.

In the case of *In re Brockman* (1), however, in which two very important questions upon the common order were decided, neither of them directly touching the present question, a full form of order for the future was suggested by the senior taxing Master and approved by the Court of Appeal, and the Master of the Rolls in delivering the judgment of the Court stated that that form was to be thereafter used in all divisions so as to secure uniformity of practice. Now that form, which is described as the common form order of course to tax bills delivered *within one month*, contains this provision with regard to the institution of proceedings: "And it is ordered that no proceedings be commenced against the petitioner in respect of the said bill pending this reference, but the said Master is to make his certificate in a month (unless the said Master shall extend the time to enable him to make his certificate), or this order is to be of no effect." And the failure to insert these qualified words in the order in this case or to omit all reference whatever to the matter is the mistake on which by his notice of motion the applicant in the present case relies. Now, as I have indicated, this particular provision of the order of course was not discussed in the judgment of the Court of Appeal in *In re Brockman* (1), and there is nothing to show that it was specially brought to the attention or that it was present to the minds of the Master of the Rolls and the Lords Justices. One may perhaps doubt whether even the Court of Appeal, at least without discussion, would have altered in this respect a form which had not only been in use since the Act of George II., but which, when the contrasting provisions of the two paragraphs of s. 37 of the Act of 1843 are regarded, may be said to be imperatively required by the statute; and one's doubts on this point are increased by the fact that in the form of order of course to tax a bill delivered within one month which is to be found in the last edition of Seton, and which it is said by the learned editors had been submitted to and approved of by the Master of the Rolls himself, the provision with regard to the commencement of proceedings is not that con-

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(1) [1909] 2 Ch. 170, 177.

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tained in the form set forth in *In re Brockman* (1), but reverts to the absolute form reproduced in the order in this case of February 27 last.

It was indeed pointed out by Mr. Manning—and it was for this reason he suggested that all reference to the subject should have been omitted from the order here—that the form of order given in Seton, where the client, as in this case, did not ask for delivery of papers, contained no prohibition at all against commencing proceedings. It is manifest, however, and on referring to one of the learned editors I have ascertained it to be the case, that that form is intended to have added to it the sentence containing the prohibition set forth in the form immediately preceding, which is the absolute prohibition to which I have just referred.

In these circumstances I am driven to the conclusion that the alteration in this respect of the order of course hitherto in use which may be supposed to have been sanctioned in *In re Brockman* (1) was not deliberate, and that it cannot be asserted that the insertion in such an order as that of February 27 of the absolute form of prohibition was either a mistake or unjustified by the Act.

But I regret that I have been compelled to come to this conclusion. I think it would be extremely desirable that words similar to, if not identical with, those appearing in the form approved in *In re Brockman* (1) should be inserted in all orders of course. Having regard to the power which the taxing Master has to extend the time limited—a power which one may safely assume would be freely, although, it may be, carefully, exercised in all proper cases (see *In re Macintosh and Thomas* (2))—the client would be placed at no disadvantage, and the solicitor would be protected from such delay and such possible abuse of the procedure of the Court as, it is complained, exists in the present case.

And I have taken the opportunity of consulting the senior taxing Master, and his view is that it would be fortunate if that form were in all cases adopted; and his opinion also is that its adoption is justified by the decision in *In re Brockman* (1) notwithstanding

(1) [1909] 2 Ch. 170.

(2) [1903] 2 Ch. 394.

the subsequent qualification of the order there made, which, as approved by the Master of the Rolls, is now found in Seton and in the printed stationers' forms. I think, however, that I would not be justified in saying that that identical form would be admissible in cases falling under par. 2 of s. 37, having regard to the express terms of that paragraph. I do think, however, that, if the words used were those which I have read from *In re Bromley* (1)—words indicating clearly that the Court in inserting them is merely protecting itself from abuse of its process by excessive delay on the part of the petitioner, and is not imposing any condition or qualification upon the right which by s. 37 of the Act of 1843 it is required to confer on him—the change would be unobjectionable; and for my part I should be glad if the common form of order for taxation within a month of delivery were in this respect for the future to take that form. Nor in saying this do I forget Mr. Swords' argument that the true remedy of the solicitor where the order contains the absolute prohibition is himself to take an appointment before the taxing Master and proceed if necessary with the taxation ex parte in the absence of the client. I cannot see that the solicitor should be driven to this course to protect himself.

But while I am of opinion that in the circumstances no such objections can be taken to the order here as were adduced in argument, I do not thereby dispose of the motion. Paragraph 7 of the solicitor's affidavit, which I have already read, has not been denied by the applicant, and no explanation whatever has been given of his delay.

In my opinion in these circumstances the client has abused the privilege conferred upon him by the order of February 27, with the result that the Court, by recourse to its inherent jurisdiction over all procedure, is entitled to stop the continuance of that abuse. I propose, therefore, to order that, unless the applicant within fourteen days from this date takes an appointment before the taxing Master to proceed with the taxation, he shall be deemed to have abandoned the order of February 27, which shall thereupon be discharged, the applicant paying the costs of that order and of this motion.

(1) 7 Beav. 487.

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If the applicant does within the time limited obtain an appointment from Master Bloxam—and that learned Master will be in attendance during the first part of the vacation—I make no order on this motion as to costs or otherwise.

Solicitors: *H. B. Priest; G. W. Grice-Hutchinson.*

A. C.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1917, will be as follows:—

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